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# Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action

By JEAN C. LOVE\*

In the early 1900's, state legislatures enacted workers' compensation statutes to afford employees a more effective remedy for work-related, accidental injuries than was available under tort law.<sup>1</sup> Tort law provided complete compensation, but required proof of negligence. Furthermore, the defenses of assumption of risk, contributory negligence, and fellow-servant negligence often barred recovery.<sup>2</sup> Workers' compensation, in contrast, provides remuneration for economic losses caused by work-related injuries without proof of fault. The legislation often is described as a "bargain," "trade-off," or "compromise" between employees and employers.<sup>3</sup> Employees have relinquished complete compensation for economic and noneconomic harm in exchange for no-fault benefits that provide swift and certain reimbursement of most economic losses.<sup>4</sup> On the other hand, employers have sacrificed their tort law defenses in exchange for limited statutory liability that exempts them from jury verdicts.<sup>5</sup> The basic policy underlying workers' compensation legislation contemplates shifting the economic burden for work-related injuries from the employee to the employer.<sup>6</sup>

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1. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.30 (1985); Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 775-76 (1982); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209 (1952) [hereinafter cited as Larson, *Nature and Origins*].

2. Larson, *Nature and Origins*, *supra* note 1, at 212.

3. *Id.* at 206; accord *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 179-80, 384 N.E.2d 353, 356 (1978); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1023, 366 N.E.2d 1145, 1146 (1977).

4. Larson, *Nature and Origins*, *supra* note 1, at 206.

5. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180, 384 N.E.2d 353, 356 (1978).

6. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973).

In 1973, the Indiana Supreme Court, in *Frampton v. Central Indiana Gas Co.*,<sup>7</sup> was asked to provide a remedy for an employee who had been discharged from her job in retaliation for filing a workers' compensation claim. The employer claimed a right to terminate the employee without cause because she was an employee at will.<sup>8</sup> The court agreed that "under ordinary circumstances an employee at will may be discharged without cause."<sup>9</sup> The court held, however, that when an employee at will is discharged "solely for exercising a statutorily conferred right," courts should recognize an exception to the general rule.<sup>10</sup> Because the employer's conduct constituted an "intentional, wrongful act," the court allowed the plaintiff to proceed with a tort action against the employer for compensatory and punitive damages.<sup>11</sup>

The appellate court of Illinois has stated succinctly the justification for recognizing a cause of action for this type of retaliatory discharge. The court observed that the state's workers' compensation act abrogated the employee's right to sue in tort in exchange for the receipt of no-fault benefits under the act.<sup>12</sup> In response to the employer's contention that an employee at will may be discharged without cause, the court stated:

To accept defendant's argument here would be to say to the employee, "Although you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, is a sure thing. However, if you exercise that right, we will fire you."<sup>13</sup>

Professor Larson finds it "odd" that the retaliatory discharge action was "so long in coming."<sup>14</sup> He speculates that "the explanation may be in the fact that the conduct involved is so contemptible that [only] a few modern employers would be willing to risk the opprobrium of being found in such a posture."<sup>15</sup> An equally probable explanation lies in the traditional strength of the employment at will doctrine in the United States.<sup>16</sup>

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7. 260 Ind. 249, 297 N.E.2d 425 (1973). Prior to 1973, the action for retaliatory discharge had been rejected in Missouri and South Carolina. *Narens v. Campbell Sixty-Six Express, Inc.*, 347 S.W.2d 204 (Mo. 1961); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *Raley v. Darling Shop*, 216 S.C. 536, 59 S.E.2d 148 (1950).

8. *Frampton*, 260 Ind. at 251-53, 297 N.E.2d at 428.

9. *Id.* at 253, 297 N.E.2d at 428.

10. *Id.*

11. *Id.* The plaintiff in *Frampton* prayed for \$45,000 in actual damages and for \$135,000 in punitive damages. *Id.* at 250, 297 N.E.2d at 427.

12. *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1024, 366 N.E.2d 1145, 1146 (1977).

13. *Id.* at 1024, 366 N.E.2d at 1147.

14. 2A A. LARSON, *supra* note 1, § 68.36(a), at 13-93 (1983).

15. *Id.*

16. For cases in which the courts, in deference to the employment at will doctrine, re-

The English common law had no employment at will doctrine. English courts presumed that a contract for an indefinite term extended for one year unless there existed reasonable cause to discharge an employee.<sup>17</sup> American courts in the nineteenth century rejected the English rule.<sup>18</sup> Influenced by the laissez-faire climate of the Industrial Revolution, American courts developed the employment at will doctrine.<sup>19</sup> This doctrine specified that when an employee was hired for an indefinite term, the employer could discharge that employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."<sup>20</sup> By the beginning of the twentieth century, the doctrine had gained universal acceptance and had attained temporary constitutional protection.<sup>21</sup>

Since the New Deal, however, government regulation has tempered the employment at will doctrine.<sup>22</sup> And, with the enactment of the Civil

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jected the retaliatory discharge action for filing a workers' compensation claim, see *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814 (Ala. 1984); *Johnson v. Gary*, 443 So. 2d 924 (Ala. 1983); *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978); *Raley v. Darling Shop*, 216 S.C. 536, 59 S.E.2d 148 (1950).

17. For a more detailed discussion of the historical development of the at will doctrine, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

18. *Id.*

19. Commentators agree that many courts were influenced by H.G. Wood's treatise on master-servant relationships, in which he wrote:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

H.G. WOOD, MASTER AND SERVANT § 134 (1877). See generally *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Epstein, In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); *Krauskopf, Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); *Naylor, Employment at Will: The Decay of an Anachronistic Shield for Employers?*, 33 DRAKE L. REV. 113 (1983-1984); *Peck, Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

20. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).

21. In *Adair v. United States*, 208 U.S. 161 (1908), the United States Supreme Court held that statutes aimed at prohibiting employers from discriminating against union members were unconstitutional. The Court retreated from this position in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding constitutionality of National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), as applied by the National Labor Relations Board, which had found that the employer had engaged in an unfair labor practice by discriminating against members of the union with regard to hiring and tenure of employment).

22. Among the most significant federal statutes limiting employer freedom are the Labor

Rights Act of 1964,<sup>23</sup> Title VII makes it unlawful for an employer to discharge an employee because of race, color, religion, sex, or national origin. Furthermore, Title VII makes it an "unlawful employment practice" for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>24</sup> Thus, Title VII not only carves out an exception to the employment at will doctrine, but also creates a cause of action for retaliatory discharge.<sup>25</sup> Congress' creation of a retaliatory discharge action in Title VII may well have paved the way for *Frampton's* recognition of a retaliatory discharge action in the workers' compensation setting.

Since 1973, twenty-seven jurisdictions<sup>26</sup> have developed some type of civil remedy<sup>27</sup> for the retaliatory discharge of an employee who has

Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 151-169 (1982) (limiting the employer's right to discriminate against union employees) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982) (setting minimum wage and maximum hours levels, limiting child labor, and prohibiting sex discrimination in wages).

23. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

24. *Id.* § 2000e-3(a).

25. See generally Denis, *Title VII Retaliation Claims*, 9 EMPLOYEE REL. L.J. 642 (1984); Spurlock, *Proscribing Retaliation Under Title VII*, 8 IND. L. REV. 453 (1975).

26. California: CAL. LAB. CODE § 132a (West Supp. 1986); Connecticut: CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); Florida: Smith v. Piezo Technology, 427 So. 2d 182 (Fla. 1983); Hawaii: HAWAII REV. STAT. §§ 378-31 to -38 (1976 & Supp. 1984); Illinois: Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Indiana: *Frampton*, 260 Ind. 249, 297 N.E.2d 425; Kansas: Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Kentucky: Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Louisiana: LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985); Maine: ME. REV. STAT. ANN. tit. 39, § 111 (1984); Maryland: Roberts v. Citicorp Diners Club, Inc., 597 F. Supp. 311 (D. Md. 1984) (applying Maryland law and relying on *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981)); Michigan: Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Minnesota: MINN. STAT. ANN. § 176.82 (West Supp. 1985); Missouri: MO. ANN. STAT. § 287.780 (Vernon Supp. 1986); Nevada: Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); New Jersey: Lally v. Copygraphics, Inc., 85 N.J. 668, 428 A.2d 1317 (1981); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985); New Mexico: Vigil v. Arzola, 699 P.2d 613 (N.M. Ct. App. 1983); New York: N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986); North Carolina: N.C. GEN. STAT. § 97-6.1 (1985); Ohio: OHIO REV. CODE ANN. § 4123.90 (Page 1980); Oklahoma: OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985); Oregon: Holien v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984); OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983); Tennessee: Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Texas: TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986); Virginia: VA. CODE § 65.1-40.1 (Supp. 1985); West Virginia: Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980); Wisconsin: WIS. STAT. ANN. § 102.35 (West Supp. 1985).

27. The civil remedies recognized by the jurisdictions listed *supra* note 26 include administrative remedies as well as civil causes of action for reinstatement and back pay. Some juris-

filed a workers' compensation claim.<sup>28</sup> Among these jurisdictions, eleven now recognize a common-law tort action,<sup>29</sup> while six states have created a statutory cause of action for damages.<sup>30</sup> Three additional states authorize equitable relief for retaliatory discharge.<sup>31</sup> Two states impose a "civil penalty" of up to one year's back pay,<sup>32</sup> and six states have created an "administrative remedy," usually allowing reinstatement and back pay.<sup>33</sup>

This Article first describes the evolution of the tort of retaliatory discharge by examining the development of the various civil remedies mentioned above. Next, the Article focuses on the components of the retaliatory discharge tort action. It describes the contours of the prima facie case of liability, considers the problems of proving the reason for

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dictions recognize a tort action for compensatory and punitive damages. See *infra* notes 95-111 & accompanying text.

28. See generally McGarry, *Retaliatory Termination in Workmen's Compensation Cases*, 44 TEX. B.J. 617 (1981); McWeeny, *Out of the Fog: A Different View on Retaliatory Employee Discharge*, 54 CONN. B.J. 235 (1980); Note, *Tort Remedy for Retaliatory Discharge: Illinois Workmen's Compensation Act Limits Employer's Power to Discharge Employees Terminable-at-Will—Kelsay v. Motorola, Inc.*, 29 DE PAUL L. REV. 561 (1980) [hereinafter cited as Note, *Tort Remedy*]; Casenote, *Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims*, 12 J. MAR. J. PRAC. & PROC. 659 (1979); Note, *Workmen's Compensation—Retaliatory Discharge—The Legislative Response to Dockery v. Lampart Table Co.*, 58 N.C.L. REV. 629 (1980) [hereinafter cited as Note, *Workmen's Compensation*]; Note, *Kelsay v. Motorola, Inc.—Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act*, 1980 U. ILL. L.F. 839 [hereinafter cited as Note, *Kelsay*].

29. Illinois: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Indiana: *Frampton*, 260 Ind. 249, 297 N.E.2d 425; Kansas: *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Kentucky: *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983); Michigan: *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983); Nevada: *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); New Jersey: *Lally v. Copygraphics, Inc.*, 85 N.J. 668, 428 A.2d 1317 (1981); New Mexico: *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983); Oregon: *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 689 P.2d 1292 (1984) (concerning sex discrimination in employment); Tennessee: *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); West Virginia: *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178 (W. Va. 1980).

30. Connecticut: CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); Minnesota: MINN. STAT. ANN. § 176.82 (West Supp. 1985); Missouri: MO. ANN. STAT. § 287.780 (Vernon Supp. 1986); North Carolina: N.C. GEN. STAT. § 97-6.1 (1985); Oklahoma: OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985); Texas: TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

31. Ohio: OHIO REV. CODE ANN. § 4123.90 (Page 1980); Oregon: OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983); Virginia: VA. CODE § 65.1-40.1 (Supp. 1985).

32. Louisiana: LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985); Wisconsin: WIS. STAT. ANN. § 102.35 (West Supp. 1985).

33. California: CAL. LAB. CODE § 132a (West Supp. 1986); Connecticut: CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); Hawaii: HAWAII REV. STAT. §§ 378-31 to -38 (1976 & Supp. 1984); Maine: ME. REV. STAT. ANN. tit. 39, § 111 (1984); New Jersey: N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985); New York: N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986).

the discharge, discusses the defenses, and then recommends the recognition of both legal and equitable remedies. Finally, the Article discusses legislation that could be enacted in states that seek to provide an administrative remedy for retaliatory discharge, in addition to the civil remedies authorized by the tort action.

This Article focuses on the tort of retaliatory discharge for the filing of a workers' compensation claim. The ramifications of the Article, however, are considerably broader. Retaliatory discharge actions have been recognized in a wide variety of contexts.<sup>34</sup> The method of establishing the *prima facie* case of liability and selecting an appropriate remedy is the same, regardless of the reason for the discharge.<sup>35</sup> The problems posed by retaliatory discharge actions are especially complex because the employee brings a tort action, yet seeks a remedy that often calls for specific performance of a contract<sup>36</sup> or for breach of contract damages.<sup>37</sup> This Article concentrates on the cause of action brought by an employee who has been discharged in retaliation for filing a workers' compensation claim because the states provide a rich variety of remedies to such a plaintiff. Consequently, this cause of action provides an ideal vehicle for a case study of the emerging tort of retaliatory discharge.

### Evolution of a Tort Action for Retaliatory Discharge

State legislatures played a leading role in the early development of the tort of retaliatory discharge. Many states enacted criminal and civil

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34. For example, a substantial number of federal regulatory statutes include provisions prohibiting retaliation against employees for reporting violations of the statutes. Civil Service Reform Act of 1978, 5 U.S.C. §§ 2301(a)(9), 2302(b)(8), 7116(a)(4) (1982); Toxic Substance Control Act, 15 U.S.C. § 2622 (1982); Jury System Improvement Act of 1978, 28 U.S.C. § 1875 (1982); Federal Water Pollution Control Act, 33 U.S.C. § 6971 (1982); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (1982); Employers' Liability Act, 45 U.S.C. § 60 (1982); Federal Railroad Safety Authorization Act of 1980, 45 U.S.C. § 441 (1982). Employees are protected against retaliatory discharge for exercising their rights under the Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (1982). And an increasing number of states are protecting "whistleblowers" against retaliatory discharge. *E.g.*, CAL. LAB. CODE §§ 1102.5, 1105 (West 1971 & Supp. 1986); MICH. COMP. LAWS ANN. § 418.301(11) (West 1985). *See generally* Annot., 9 A.L.R.4TH 329 (1985) (liability for discharging at will employee for whistleblowing).

35. *E.g.*, *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985) (Title VII retaliatory discharge); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (whistleblower's retaliatory discharge); *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983) (workers' compensation retaliatory discharge); *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 389 N.E.2d 1075, 416 N.Y.S.2d 554 (1979) (workers' compensation retaliatory discharge).

36. *See, e.g.*, *Duncan v. New York State Dev. Center*, 93 A.D.2d 242, 463 N.Y.S.2d 540 (1983) (retaliatory discharge plaintiff granted reinstatement).

37. *See, e.g.*, *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983) (authorizing retaliatory discharge plaintiff to recover lost wages and incidental damages, such as moving expenses).

penalties that expressed public opposition to the practice of retaliatory discharge. Furthermore, a few states passed provisions expressly creating a duty not to discharge a workers' compensation claimant, thus providing the basis for an implied tort remedy.

The first phase of the development of the tort of retaliatory discharge began when states imposed a criminal<sup>38</sup> or civil<sup>39</sup> penalty for such wrongful discharge. Missouri, the first state to legislate a criminal penalty, imposed on the employer a fine of \$50 to \$500, imprisonment of one week to one year, or both.<sup>40</sup> These sanctions were relatively light, however, and they proved to be ineffective.<sup>41</sup> Nevertheless, the criminal statutes provided a basis for employees to assert tort claims against their employers for retaliatory discharge. In *Christy v. Petrus*,<sup>42</sup> for example, a Missouri employee sought to recover \$7500 in compensatory damages and \$10,000 in punitive damages for his allegedly wrongful discharge after he had filed a workers' compensation claim.

Initially, courts hesitated to ground a tort action upon an employer's violation of a criminal statute. Thus, the *Christy* court held that the plaintiff failed to state a cause of action.<sup>43</sup> The court was unable to find anything in the wording or in the historical background of the criminal statute to indicate "any legislative intent to create a new civil claim of this nature in the discharged employee."<sup>44</sup> The *Christy* court emphasized the fact that the legislature had enacted the criminal penalty in 1925 as part of the original Missouri workers' compensation law.<sup>45</sup> The court thus deemed the section to be merely "preventive" in nature; it was not intended to "remedy" an existing custom or practice relating to the retaliatory discharge of workers' compensation claimants.<sup>46</sup>

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38. See, e.g., ARK. STAT. ANN. § 81-1335(b) (1976); CAL. LAB. CODE § 132a (West Supp. 1986); MD. ANN. CODE art. 101, § 39A (1979); MO. ANN. STAT. § 287.780 (Vernon 1965) (replaced in 1973 with a civil remedy created by MO. ANN. STAT. § 287.780 (Vernon Supp. 1986)); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985).

39. N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986); WIS. STAT. ANN. § 102.35 (West Supp. 1985).

40. MO. ANN. STAT. § 287.780 (Vernon 1965).

41. In *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956), the court observed that the Missouri criminal statute had never been interpreted by an appellate court. *Id.* at 1190, 295 S.W.2d at 124. In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the court noted the very real possibility that some employers would risk the threat of criminal sanctions in order to avoid their responsibilities under the workers' compensation statute. *Id.* at 185, 384 N.E.2d at 359.

42. 365 Mo. 1187, 295 S.W.2d 122 (1956).

43. *Id.* at 1188, 295 S.W.2d at 123.

44. *Id.* at 1192, 295 S.W.2d at 126.

45. *Id.* at 1190, 295 S.W.2d at 124.

46. *Id.* at 1190-91, 295 S.W.2d at 125. In 1973, the Missouri legislature responded to



Unlike Missouri, five other states imposed criminal penalties for retaliatory discharge after having enacted workers' compensation legislation.<sup>47</sup> In these jurisdictions, plaintiffs were more successful in establishing a common-law tort action for retaliatory discharge.<sup>48</sup> For example, in *Kelsay v. Motorola, Inc.*,<sup>49</sup> the Illinois Supreme Court recognized a tort action based upon the public policy reflected in the following criminal statute: "It shall be unlawful for any employer . . . to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act."<sup>50</sup>

The existence of the criminal statute encouraged the court in *Kelsay* to recognize an exception to the common-law employment at will doctrine.<sup>51</sup> The employer in *Kelsay* contended that the legislature intended the criminal sanctions to be the exclusive remedy for a retaliatory discharge.<sup>52</sup> The court rejected this argument, however, observing that the imposition "of a small fine, enuring to the benefit of the state, does nothing to alleviate the plight of those employees who are threatened with retaliation and forgo their rights, or those who lose their jobs when they proceed to file claims under the Act."<sup>53</sup> The *Kelsay* court also rejected the employer's argument that the workers' compensation act's "exclusive remedy" clause precluded a retaliatory discharge action.<sup>54</sup> The Illinois court, like other courts that subsequently have considered the issue,<sup>55</sup> held that the exclusive remedy clause "was meant to limit recovery by employees to the extent provided by the Act in regard to work-related injuries, and was not intended to insulate the employer from independent

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*Christy* by authorizing a "civil action for damages." MO. ANN. STAT. § 287.780 (Vernon Supp. 1986).

47. ARK. STAT. ANN. § 81-1335(b) (1976); CAL. LAB. CODE § 132a (West Supp. 1986); ILL. ANN. STAT. ch. 48, § 138.4(h) (Smith-Hurd Supp. 1985); MD. ANN. CODE art. 101, § 39A (1985); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985).

48. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Lally v. Copygraphics, Inc.*, 85 N.J. 668, 428 A.2d 1317 (1981).

49. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

50. ILL. ANN. STAT. ch. 48, § 138.4(h) (Smith-Hurd Supp. 1985). The statute was enacted after the plaintiff's discharge, but three years prior to the Illinois Supreme Court's decision in *Kelsay*. 74 Ill. 2d at 181, 384 N.E.2d at 357.

51. *Kelsay*, 74 Ill. 2d at 181, 384 N.E.2d at 357.

52. *Id.* at 184, 384 N.E.2d at 358.

53. *Id.* at 185, 384 N.E.2d at 359.

54. *Id.* at 184, 384 N.E.2d at 358. The exclusive remedy clause in *Kelsay* specified that the provisions of the workers' compensation act "shall be the measure of the responsibility of any employer." *Id.* For a general discussion of exclusive remedy provisions, see 2A A. LARSON, *supra* note 1, §§ 65.00-67.50 (1983).

55. Annot., 32 A.L.R.4TH 1221 (1984).

tort actions"<sup>56</sup> for the separate harm caused by a retaliatory discharge.

The second step in the evolution of the tort of retaliatory discharge was taken when states enacted legislation prohibiting the act of retaliatory discharge without imposing criminal sanctions.<sup>57</sup> Such legislation left the courts free to design appropriate civil remedies, and precluded employers from contending that the statute provided criminal penalties that were intended to be exclusive.<sup>58</sup> For example, in 1979 the Florida legislature decreed: "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation . . . under the Workers' Compensation Law."<sup>59</sup> In *Smith v. Piezo Technology*,<sup>60</sup> the Florida Supreme Court held that the legislature had created a statutory tort action when it enacted this section.<sup>61</sup> Although the court refused to recognize a common-law tort action for retaliatory discharge,<sup>62</sup> it felt compelled to authorize a civil remedy for the violation of the statute: "[I]t must be assumed that a provision enacted by the legislature is intended to have some useful purpose."<sup>63</sup> Thus, the court concluded that the statute not only created a duty, but, by implication, also conferred upon the court the power to create an appropriate remedy for the violation of that duty.

In the third phase of the development of the retaliatory discharge tort, legislatures in several states authorized civil remedies to be administered by workers' compensation agencies.<sup>64</sup> These statutes were designed to fill the need created by the courts' reluctance to recognize a common-law tort action.<sup>65</sup>

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56. *Kelsay*, 74 Ill. 2d at 184, 384 N.E.2d at 358.

57. See, e.g., FLA. STAT. ANN. § 440.205 (West 1981); W. VA. CODE § 23-5A-1 (1985).

58. See *supra* notes 52-53 & accompanying text.

59. FLA. STAT. ANN. § 440.205 (West 1981). As originally proposed, the Florida statute did provide for compensatory damages and injunctive relief, but the conference committee deleted all of the remedies provisions. *Piezo Technology v. Smith*, 413 So. 2d 121, 124 (Fla. Dist. Ct. App. 1982) (Ervin, J., dissenting), *aff'd*, 427 So. 2d 182 (Fla. 1983).

60. 427 So. 2d 182 (Fla. 1983).

61. *Id.* at 184.

62. *Id.*

63. *Id.* The concurring judge would have gone further and recognized a common-law tort action of retaliatory discharge. *Id.* at 185 (Overton, J., concurring).

64. CAL. LAB. CODE § 132a (West Supp. 1986); CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); HAWAII REV. STAT. §§ 378-31 to -38 (1976 & Supp. 1984); LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985); ME. REV. STAT. ANN. tit. 39, § 111 (1984); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1985); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986); WIS. STAT. ANN. § 102.35 (West Supp. 1985).

65. For cases refusing to recognize a common-law tort action, see *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Narens v. Campbell Sixty-Six Express, Inc.*, 347 S.W.2d 204 (Mo. 1961); *Christy*, 365 Mo. 1187, 295 S.W.2d 122; *Raley v. Darling Shop*, 216 S.C. 536, 59 N.E.2d 148 (1950).

Statutes creating an administrative remedy typically provide for reinstatement and back pay.<sup>66</sup> The Louisiana and Wisconsin statutes limit the amount of back pay recoverable to one year's lost wages.<sup>67</sup> Statutes in other states permit the wrongfully discharged claimant to recover a reasonable attorney's fee.<sup>68</sup> In California, the administrative agency assesses an additional penalty payable to the employee in an amount equal to one-half of the employee's workers' compensation benefits, but not to exceed \$10,000.<sup>69</sup>

A statute creating an administrative remedy may state explicitly that it is the exclusive remedy for the victim of a retaliatory discharge.<sup>70</sup> Many of the legislatures that have created administrative remedies, however, have failed to resolve the issue of whether such a remedy purports to be exclusive.<sup>71</sup> In a state where the legislature has remained silent, a Wisconsin appellate court has ruled that the administrative remedy is exclusive.<sup>72</sup> That court relied on the doctrine that workers' compensation benefits are generally an injured employee's exclusive remedy:

The legislative intent behind worker's compensation was to limit an employer's liability in exchange for the employee's sure and swift recovery of scheduled payments . . . . The right of the employee to recover compensation provided for by worker's compensation is exclusive of all other remedies against the employer; such is the nature of the balance struck by the legislature.<sup>73</sup>

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66. See, e.g., CAL. LAB. CODE § 132a (West Supp. 1986); CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985). New York provides that an employer may not insure against liability for retaliatory discharge. N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986).

67. LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985); WIS. STAT. ANN. § 102.35 (West Supp. 1985). This limitation is reminiscent of the English common-law rule, which presumed that a contract for an indefinite term extended for one year unless there was reasonable cause to discharge the employee. See *supra* note 17 & accompanying text.

68. See, e.g., CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986).

69. CAL. LAB. CODE § 132a (West Supp. 1986).

70. See, e.g., *MacDonald v. Eastern Fine Paper, Inc.*, 485 A.2d 228 (Me. 1984) (statute provided for exclusivity of the administrative remedy).

71. This issue arises whenever the statute fails to specify the exclusivity of the administrative remedy.

72. *Cornejo v. Polycon Indus., Inc.*, 109 Wis. 2d 649, 327 N.W.2d 183 (Wis. Ct. App. 1982); accord *Portillo v. G.T. Price Prods., Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982). For a discussion of the California case law, see Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65 (1982); Comment, *Public Policy Limitations on the Retaliatory Discharge of At Will Employees in the Private Sector*, 14 U.C.D. L. REV. 811 (1981).

73. *Cornejo v. Polycon Indus., Inc.*, 109 Wis. 2d 649, 654, 327 N.W.2d 183, 185 (Wis. Ct. App. 1982).

The New Jersey Supreme Court, in *Lally v. Copygraphics, Inc.*,<sup>74</sup> has concluded that a plaintiff has a common-law tort action for retaliatory discharge in addition to, or in lieu of, an action for administrative relief. The court determined that the penal<sup>75</sup> and administrative remedies directed at retaliatory discharge would be "augmented" by recognition of an "alternative or supplemental judicial right to secure civil redress"<sup>76</sup> through a common-law tort action.<sup>77</sup> Unlike Wisconsin, the New Jersey court took the position that a common-law tort action for retaliatory discharge complements the legislative policies that underlie the creation of an administrative remedy.<sup>78</sup>

The New Jersey Supreme Court's position is preferable because the exclusive remedy clause relied upon by the Wisconsin court is only intended to make workers' compensation benefits the exclusive remedy for job-related injuries.<sup>79</sup> An action for retaliatory discharge does not compensate the worker for job-related injuries. Instead, it provides reimbursement for losses caused by the employer's wrongful conduct in terminating an employee who has filed for workers' compensation benefits.<sup>80</sup> Furthermore, as stated by the New Jersey court, "if the Legislature had wanted to foreclose a judicial cause of action, it would have done so expressly."<sup>81</sup> In the absence of an explicit exclusive remedy provision, the plaintiff should be allowed to elect either an administrative remedy, a tort remedy in lieu of an administrative remedy, or a tort remedy as a supplement to an administrative remedy.<sup>82</sup>

Although administrative remedies have helped to fill the vacuum created by the judiciary's reluctance to recognize a tort of retaliatory discharge, claimants in some states have found these remedies to be inadequate.<sup>83</sup> In Oregon, for example, claimants seeking administrative relief have had to wait two to four years for a hearing.<sup>84</sup> Disgruntled with the administrative process, some legislatures have taken the fourth step in

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74. 85 N.J. 668, 428 A.2d 1317 (1981).

75. N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985).

76. *Lally*, 85 N.J. at 670, 428 A.2d at 1318.

77. *Id.*

78. *Id.* at 670-71, 428 A.2d at 1318.

79. *Kelsay*, 74 Ill. 2d at 184, 384 N.E.2d at 358; *Hernandez v. Home Educ. Livelihood Program, Inc.*, 98 N.M. 125, 128, 645 P.2d 1381, 1384 (N.M. Ct. App. 1982).

80. *See, e.g., Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 412, 207 Cal. Rptr. 663, 669 (1984).

81. *Lally*, 85 N.J. at 671, 428 A.2d at 1319.

82. *Id.* at 672, 428 A.2d at 1319. For further discussion of these various remedies, see *infra* notes 252, 289-92 & accompanying text.

83. *See generally Lally*, 85 N.J. 668, 428 A.2d 1317.

84. *Brown v. Transcon Lines*, 284 Or. 597, 609, 588 P.2d 1087, 1093 (1978).

the development of the tort of retaliatory discharge by authorizing a statutory tort action for equitable relief. For example, a bill was introduced in Oregon that provided: "Any person claiming to be aggrieved by [a retaliatory discharge] shall have a cause of suit to recover compensatory damages, punitive damages and such further relief as will eliminate the effects of [the discharge]."<sup>85</sup> There was keen opposition, however, to the creation of a statutory tort action with a damages remedy.<sup>86</sup> Employers preferred the equitable remedies used to enforce Title VII.<sup>87</sup> As a result, jurisdictions like Oregon now have enacted statutes providing that a retaliatory discharge victim may file a civil suit for injunctive relief and for "such other equitable relief as may be appropriate, including but not limited to reinstatement . . . with or without back pay."<sup>88</sup> Such legislation may provide that the filing of a civil suit constitutes an election of a judicial remedy and a waiver of the right to file an administrative complaint.<sup>89</sup>

Even legislation authorizing equitable relief for retaliatory discharge, however, does not provide an adequate remedy for the wrong. As the Oregon Supreme Court observed in *Holien v. Sears, Roebuck & Co.*,<sup>90</sup> Title VII and the imitative retaliatory discharge statutes fail to capture the individualized nature of the injury suffered by a wrongfully discharged employee. Neither general damages nor punitive damages are recoverable under Title VII.<sup>91</sup> Nor are such damages recoverable under the relevant employment discrimination legislation enacted in Oregon.<sup>92</sup> The court noted that "[r]einstatement, back pay, and injunctions vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense

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85. See *id.* at 608, 588 P.2d at 1092.

86. Opposition is implied by the substantial changes made in the bill. See *id.* at 609, 588 P.2d at 1093.

87. Title VII provides:

[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1982).

88. OR. REV. STAT. § 659.121 (1983); accord OHIO REV. CODE ANN. § 4123.90 (Page 1980) (relief limited to reinstatement with back pay and attorney's fees); VA. CODE § 65.1-40.1 (Supp. 1985) (authorizes not only reinstatement with back pay plus attorney's fees, but also "actual damages").

89. See, e.g., OR. REV. STAT. § 659.121(4) (1983).

90. 689 P.2d 1292 (Or. 1984).

91. See, e.g., *Shah v. Mount Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).

92. *Holien*, 689 P.2d at 1305.

of degradation, and the cost of psychiatric care.”<sup>93</sup> Thus, the Oregon court recognized that legal as well as equitable remedies are needed to compensate adequately a wrongfully discharged plaintiff.<sup>94</sup>

The inadequacy of purely equitable relief has led to the fifth phase in the development of the tort of retaliatory discharge. In recent years, legislatures in Connecticut,<sup>95</sup> North Carolina,<sup>96</sup> Oklahoma,<sup>97</sup> and Texas<sup>98</sup> have enacted statutes that impose civil liability for retaliatory discharge, authorizing both legal and equitable relief. For example, statutes in North Carolina,<sup>99</sup> Oklahoma,<sup>100</sup> and Texas<sup>101</sup> provide that an employer shall be liable in a civil action “for reasonable damages suffered by an employee” as a result of a retaliatory discharge.<sup>102</sup> These statutes also provide that discharged employees “shall be entitled to be reinstated” to their former positions.<sup>103</sup>

Despite the similarity in statutory language, courts in these states remain at odds on the issue of punitive damages. The North Carolina Court of Appeals ruled that punitive damages are not recoverable under the above language because “[p]unitive damages, by their very nature, are not damages ‘suffered’ by anyone.”<sup>104</sup> The Oklahoma Supreme Court<sup>105</sup> reached a contrary conclusion. In *Webb v. Dayton Tire & Rubber Co.*,<sup>106</sup> the court observed that the Oklahoma statute authorized the recovery of “reasonable damages,” a term that gives “broad discretion” to the court in determining the amount of recovery.<sup>107</sup> The court then

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93. *Id.* at 1303.

94. *Id.* at 1303-04. The court held that the statute prohibiting punitive and emotional distress damages in a discrimination case did not preclude plaintiff from recovering such damages in a separate cause of action for wrongful discharge. *See also* Crosby v. Saif Corp., 699 P.2d 198, 200 (Or. Ct. App. 1985) (retaliatory discharge plaintiff allowed to proceed with a common-law tort action for conspiracy to deprive him of workers' compensation benefits, despite Oregon's statutory equitable remedy, which plaintiff did not invoke).

95. CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985).

96. N.C. GEN. STAT. § 97-6.1 (1985).

97. OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985).

98. TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986); *see also* MINN. STAT. ANN. § 176.82 (West Supp. 1985); MO. ANN. STAT. § 287.780 (Vernon Supp. 1986).

99. N.C. GEN. STAT. § 97-6.1 (1985).

100. OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985).

101. TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

102. N.C. GEN. STAT. § 97-6.1 (1985); OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

103. N.C. GEN. STAT. § 97-6.1 (1985); OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

104. Buie v. Daniel Int'l Corp., 56 N.C. App. 445, 447, 289 S.E.2d 118, 119 (1982).

105. Webb v. Dayton Tire & Rubber Co., 697 P.2d 519 (Okla. 1985).

106. 697 P.2d 519 (Okla. 1985).

107. *Id.* at 523.

concluded that punitive damages should be available as a matter of policy: "In the absence of the deterrent effect of punitive damages, there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a [workers'] compensation claim."<sup>108</sup> The Texas Supreme Court applied similar reasoning to find that the phrase "reasonable damages" encompasses both future lost wages<sup>109</sup> and damages for "inconvenience and mental anguish."<sup>110</sup> The Texas court has not yet ruled, however, on whether punitive damages are recoverable under the statute.<sup>111</sup>

The final and most recent step in the development of the tort of retaliatory discharge has been taken by the judiciary. In states that have not enacted legislation authorizing both legal and equitable relief for victims of retaliatory discharge, some courts have begun to take the initiative by creating a common-law tort action of retaliatory discharge.<sup>112</sup> For example, although the legislatures in Tennessee and Kansas have refused to pass retaliatory discharge statutes,<sup>113</sup> the courts in these states have recognized a common-law retaliatory discharge action for legal damages, including punitive damages in future cases.<sup>114</sup> In New Mexico, although the judiciary at first deferred to the legislature to fashion a remedy for retaliatory discharge,<sup>115</sup> it later became impatient and created a common-law tort action.<sup>116</sup> Because the judiciary had formulated the employment at will doctrine, the New Mexico court reasoned that the

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108. *Id.*

109. *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1981).

110. *Id.* at 454-55.

111. *Id.* at 454-55 & n.7.

112. *See, e.g.,* *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 495-97, 630 P.2d 186, 192-93 (1981); *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. Ct. App. 1983); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

113. *See* *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 496, 630 P.2d 186, 192 (1981); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

114. *See* *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 496, 630 P.2d 186, 193 (1981); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

115. *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 796, 635 P.2d 992, 997-98 (N.M. Ct. App. 1981) (dismissed on ground that recognition of a new cause of action for retaliatory discharge is best addressed by the legislature); *see also* *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 876-77 (Miss. 1981) (deferring to legislature to create a statutory retaliatory discharge action and recommending that Mississippi adopt the language of the Texas statute).

116. *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. Ct. App. 1983). Although the court in *Vigil* distinguished *Bottijliso* on the ground that *Bottijliso* was a retaliatory discharge action and not a wrongful discharge action, the reasoning in *Vigil* clearly paves the way for directly overruling *Bottijliso* in the future.

judiciary also could modify it.<sup>117</sup> Courts<sup>118</sup> that recently have created a common-law retaliatory discharge action have relied on the public policy implicit in workers' compensation legislation to override the employment at will doctrine:

We know of no more effective way to nullify the basic purposes of [a workers'] compensation system than to force employees to choose between a continuation of employment or the submission of an industrial claim . . . . It would not only frustrate the statutory scheme, but also provide employers with an inequitable advantage if they were able to intimidate employees with the loss of their jobs upon the filing of claims for insurance benefits as a result of industrial injuries.<sup>119</sup>

Reviewing the evolution of the tort of retaliatory discharge, it is apparent that statutes imposing criminal or civil penalties initially proscribed employer misconduct.<sup>120</sup> These statutes occasionally provided the basis for judicial recognition of a common-law tort action, but courts in most jurisdictions continued to adhere to the employment at will doctrine. As a result of this failure to provide judicial recourse for wrongfully discharged claimants, legislatures enacted administrative remedies.<sup>121</sup> While these remedies represented some improvement, they sometimes proved to be inadequate.<sup>122</sup> A few states then created a civil, equitable cause of action for retaliatory discharge.<sup>123</sup> More recently, several state legislatures have enacted statutes authorizing both legal and equitable relief.<sup>124</sup> These statutes have inspired courts in other jurisdictions to create a comparable common-law tort action based upon the policies implicit in workers' compensation legislation.<sup>125</sup> As stated by the Kentucky Supreme Court<sup>126</sup> when it recognized a retaliatory discharge tort action, "the common law is not a stagnant pool but a 'mighty' stream," and "[w]e should provide a remedy where the wrong and the damages are clearly defined and commonly recognized."<sup>127</sup>

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117. *Id.*

118. *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730, 732 (Ky. 1983) (finding implicit in the state's workers' compensation statute the public policy that an employee has the right to assert a lawful claim); *Hansen v. Harrah's*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984) (finding in the workers' compensation law a clear public policy favoring economic security for injured employees and concluding that to deny retaliatory discharge claim would nullify the basic purpose of the law).

119. *Hansen v. Harrah's*, 100 Nev. 60, 64-65, 675 P.2d 394, 397 (1984).

120. *See supra* notes 38-63 & accompanying text.

121. *See supra* notes 64-82 & accompanying text.

122. *See supra* notes 83-84 & accompanying text.

123. *See supra* notes 85-94 & accompanying text.

124. *See supra* notes 95-111 & accompanying text.

125. *See supra* notes 112-19 & accompanying text.

126. *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983).

127. *Id.* at 733.



## Components of the Tort of Retaliatory Discharge

As evidenced by the legal developments chronicled above, a cause of action for retaliatory discharge is evolving. Although the action has been authorized legislatively in some jurisdictions<sup>128</sup> and judicially recognized in others,<sup>129</sup> it is uniformly described as a tort action.<sup>130</sup> This part of the Article discusses the elements of the *prima facie* case, including the special problems surrounding the issue of the employer's motivation. It then identifies the defenses most commonly asserted. Finally, it surveys the spectrum of legal and equitable remedies that may be invoked to deter and to compensate for the losses caused by retaliatory discharges. The purpose of this section is not only to describe existing case law, but also to recommend new directions for the future evolution of the retaliatory discharge action.

### Prima Facie Case

A plaintiff who brings a cause of action for retaliatory discharge must allege that the defendant-employer terminated the employee for an improper reason.<sup>131</sup> In the case of a workers' compensation claimant, the plaintiff must allege that he or she was discharged in retaliation for requesting workers' compensation benefits.<sup>132</sup> In essence, the plaintiff's position is that, although an employer may have the right to terminate the employee at will, it may not do so for a retaliatory purpose.<sup>133</sup>

Three basic elements of a *prima facie* case can be distilled from existing case law.<sup>134</sup> First, the plaintiff must have exercised a statutory or constitutional right.<sup>135</sup> Second, the plaintiff must have been discharged. And third, the plaintiff must prove some causal connection between the

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128. See *supra* notes 95-98 & accompanying text.

129. See *supra* notes 112-19 & accompanying text.

130. See, e.g., *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1282-85 (Ill. 1984) (tort action not barred by collective bargaining agreement), *cert. denied*, 105 S. Ct. 3513 (1985); *Scott v. Union Tank Car Co.*, 402 N.E.2d 992, 993 (Ind. Ct. App. 1980) (applying tort statute of limitations); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 182 (W. Va. 1980) (applying tort statute of limitations).

131. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 475-78, 427 A.2d 385, 386-88 (1980) (retaliatory discharge action permissible when employee terminated for compliance with state law). See generally *Krauskopf*, *supra* note 19, at 234.

132. See, e.g., *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973).

133. *Loucks v. Star City Glass Co.*, 551 F.2d 745, 747 (7th Cir. 1977) (court finds "purpose" irrelevant under at will doctrine).

134. See generally *Krauskopf*, *supra* note 19, at 243-49.

135. See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 534-35 (2d ed. 1983) (discussing elements of Title VII retaliatory discharge action).

exercise of the legal right and the discharge.<sup>136</sup> The cause of action is described correctly as an "intentional" tort action.<sup>137</sup> The intent that must be proven is an intent to terminate an employee who has exercised a legally protected right.<sup>138</sup>

With respect to the first element of the *prima facie* case, the courts generally require proof that the plaintiff exercised a statutory or constitutional right<sup>139</sup> because the practical effect of a retaliatory discharge action is to restrict an employer's freedom to terminate an employee at will. The courts are more comfortable imposing such a restriction when the cause of action is premised on legislative policy.<sup>140</sup>

Courts have differed in determining what constitutes the exercise of a statutory right under workers' compensation legislation.<sup>141</sup> For example, a few courts hold that, in order to state a cause of action, the plaintiff must have filed a formal complaint for workers' compensation benefits prior to the allegedly wrongful discharge.<sup>142</sup> Such a rule may encourage an employer to terminate an injured employee expeditiously, before the employee has an opportunity to file a claim.<sup>143</sup> A better approach, and

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136. For a discussion of the various tests of causation that may be applied in determining what motivated an employer to discharge an employee, see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

137. *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 682-83 (W. Va. 1981) (analogizing retaliatory discharge to constructive fraud for statute of limitations purposes).

138. *Id.* at 683.

139. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-83, 384 N.E.2d 353, 356-58 (1978) (limits discussion to terminations that "undermine" workers' compensation statute); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983) (protection of employee should not extend beyond "constitutionally protected activity" or public policy established by legislative determination). For a current case holding that employees of a private employer failed to state a cause of action for retaliatory discharge, see *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 478 N.E.2d 1354 (1985) (plaintiffs alleging a violation of first amendment unsuccessful due to their failure to allege state action).

140. When the retaliatory discharge action is premised on a violation of workers' compensation legislation, the federal courts have held that such an action may not be removed to federal court due to 28 U.S.C. § 1445(c) (1982), which provides that "[a] civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." *Id.*; see, e.g., *Roberts v. Citicorp Diners Club, Inc.*, 597 F. Supp. 311 (D. Md. 1984) (retaliatory discharge case based on workers' compensation legislation remanded to state court).

141. See generally Note, *Tort Remedy*, *supra* note 28; Note, *Workmen's Compensation*, *supra* note 28, at 639-46.

142. See, e.g., *Bryant v. Dayton Casket Co.*, 69 Ohio St. 2d 367, 370-71, 433 N.E.2d 142, 144-45 (1982) (plaintiff must have taken some action that would constitute "actual pursuit of his claim"); *Genheimer v. Clark Grove Vault Co.*, 70 Ohio App. 2d 65, 68-69, 434 N.E.2d 744, 746-47 (1980) (requires plaintiff to have "filed a claim or instituted, pursued, or testified" in workers' compensation proceeding at time of discharge).

143. For an excellent discussion of this problem, see *Wolcovicz v. Intercraft Indus. Corp.*,

one more consistent with the informality of workers' compensation proceedings, would be a rule that allows a plaintiff to bring a retaliatory discharge action if the injured employee has claimed, attempted to claim, or expressed an intention to claim workers' compensation benefits.<sup>144</sup> This is the essence of the law in most jurisdictions that have considered the question.<sup>145</sup> The specific formulations of the rule, however, vary. Depending on the jurisdiction, an employee may sue for retaliatory discharge if he or she has taken one or more of the following actions: filed a claim or instituted proceedings;<sup>146</sup> instituted, or caused to be instituted, in good faith, any proceeding;<sup>147</sup> claimed or attempted to claim benefits;<sup>148</sup> filed a claim, hired a lawyer, or instituted in good faith any proceeding;<sup>149</sup> filed or made known an intention to file a claim;<sup>150</sup> received or attempted to receive benefits;<sup>151</sup> or suffered a work injury.<sup>152</sup> A court recognizing a common-law retaliatory discharge action should examine the statutory formulations carefully and should adopt a rule that takes

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478 N.E.2d 1039, 1042-43 (Ill. App. Ct. 1985); *Zaragoza v. Oneok, Inc.*, 700 P.2d 662, 665-66 (Okla. Ct. App. 1985).

144. See, e.g., CAL. LAB. CODE § 132a (West Supp. 1986) (authorizing an administrative remedy for retaliatory discharge).

145. E.g., *Wolcovicz v. Intercraft Indus. Corp.*, 478 N.E.2d 1039, 1042 (Ill. App. Ct. 1985) (sufficient that plaintiff was discharged "because of his activities"); *Delano v. City of South Portland*, 405 A.2d 222, 227 (Me. 1979) (formal filing of claim not required); *Wright v. Fiber Indus. Inc.*, 60 N.C. App. 486, 491, 299 S.E.2d 284, 287 (1983) (A discharge after plaintiff informed employer of intent to file claim is retaliatory discharge.); *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519, 521 (Okla. 1985) (Receipt of temporary disability payments is "institution of proceedings" so as to prohibit retaliatory discharge by employer.); *Zaragoza v. Oneok, Inc.*, 700 P.2d 662, 666 (Okla. Ct. App. 1985) (notice requirement satisfied when employer received written report from employee's physician); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 114-16 (Tex. 1976) (formal filing of claim not required).

146. MICH. STAT. ANN. § 17.237 (301)(11) (Callaghan Supp. 1985); see also LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985) ("plaintiff having asserted a claim . . . for benefits"); MO. ANN. STAT. § 287.780 (Vernon Supp. 1986) ("exercising any of his rights"); OR. REV. STAT. § 659.410 (1983) ("has applied for benefits or has invoked or utilized the procedures provided for").

147. N.C. GEN. STAT. § 97-6.1 (1985).

148. CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985) ("has filed a claim . . . or otherwise exercised the rights"); FLA. STAT. ANN. § 440.205 (West 1981); ME. REV. STAT. ANN. tit. 39, § 111 (1984) ("asserting any claim under this act"); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985) ("claimed or attempted to claim benefits"); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986) ("claimed or attempted to claim compensation"); WIS. STAT. ANN. § 102.35 (West Supp. 1985).

149. TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986); see also OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1985).

150. CAL. LAB. CODE § 132a (West Supp. 1986); see also MINN. STAT. ANN. § 176.82 (West Supp. 1985) ("seeking benefits"); VA. CODE § 65.1-40.1 (Supp. 1985) ("intends to file or has filed").

151. W. VA. CODE § 23-5A-1 (1985).

152. HAWAII REV. STAT. § 378-32(2) (Supp. 1984).

into account the informality and policy objectives of workers' compensation proceedings.

The second element of the *prima facie* case for retaliatory discharge is proof that the plaintiff was discharged.<sup>153</sup> Although this element seems quite simple and straightforward, in fact legislatures have had difficulty describing the outer limits of the defendant's actionable conduct. States that have recognized a civil remedy universally agree that a retaliatory discharge is actionable.<sup>154</sup> At the other end of the spectrum, some legislatures also allow a cause of action for "discrimination" against a workers' compensation claimant.<sup>155</sup> Between these two poles of the spectrum, legislatures have formulated varying descriptions of the conduct that will make an employer liable: to discharge, threaten to discharge, intimidate, or coerce an employee;<sup>156</sup> to discharge or demote an employee;<sup>157</sup> to discharge, threaten to discharge, intentionally obstruct an employee seeking workers' compensation benefits;<sup>158</sup> to discharge, demote, reassign, or take any punitive action against an employee;<sup>159</sup> and to refuse to rehire an employee.<sup>160</sup> Courts recognizing a common-law tort action have not yet addressed the question of what constitutes actionable conduct by the employer.<sup>161</sup>

Courts must balance competing policies in determining what conduct by the employer is actionable. On one hand, the courts may want to preserve the essence of the employment at will doctrine, and a restrictive definition of the employer's actionable conduct advances that objective.<sup>162</sup> On the other hand, the courts may want to promote the remedial

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153. See generally Note, *Workmen's Compensation*, *supra* note 28.

154. See, e.g., LA. REV. STAT. ANN. § 23:1361 (West Supp. 1985); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1985); VA. CODE § 65.1-40.1 (Supp. 1985).

155. CAL. LAB. CODE § 132a (West Supp. 1986); CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); MICH. STAT. ANN. § 17.237 (301)(11) (Callaghan Supp. 1985); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1985); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

156. See, e.g., FLA. STAT. ANN. § 440.205 (West 1981); see also *Sloan v. Southern Bell Tel. & Tel.*, 505 F. Supp. 1085 (S.D. Fla. 1981) ("reduction of disability payments" not actionable as retaliatory discharge).

157. N.C. GEN. STAT. § 97-6.1 (1985).

158. MINN. STAT. ANN. § 176.82 (West Supp. 1985).

159. OHIO REV. CODE ANN. § 4123.90 (Page 1980); see also *Delano v. City of South Portland*, 405 A.2d 222, 228 (Me. 1979) (demotion is actionable as retaliatory "discrimination").

160. WIS. STAT. ANN. § 102.35 (West Supp. 1985).

161. In *Bryce v. Johnson & Johnson*, 115 Ill. App. 3d 913, 921, 450 N.E.2d 1235, 1240-41 (1983), the court held that the employer had neither explicitly nor constructively discharged the plaintiff, making it unnecessary to discuss the issue of what constitutes actionable conduct by the defendant in a common-law retaliatory discharge action.

162. See generally *Krauskopf*, *supra* note 19, at 232-34.

purposes of workers' compensation legislation, and a liberal definition of the actionable conduct advances this objective.<sup>163</sup> In all likelihood, greater weight will be given to the compensatory objectives of workers' compensation legislation as the courts develop case by case definitions of the employer's actionable conduct in the common-law tort action.

The final issue with respect to the second element of the *prima facie* case is the identity of the defendant. An employee is entitled to bring a retaliatory discharge action against a current employer under even the most restrictive statutory formulation.<sup>164</sup> But may a plaintiff bring an action against an employer who has fired the plaintiff after learning that the plaintiff had filed a workers' compensation claim against a former employer? And may a plaintiff sue a duly authorized agent of the employer who has discharged the plaintiff on behalf of the employer? Both of these questions have been answered affirmatively by some courts. Two courts recently have ruled that if an employer fires a plaintiff after learning that the plaintiff had filed a workers' compensation claim against a former employer, the court must recognize a cause of action for retaliatory discharge in order to facilitate the objectives of workers' compensation legislation.<sup>165</sup> Two courts have allowed claims to be filed against duly authorized agents of the discharging employer.<sup>166</sup> In doing so, one court reasoned that "it would distort normal tort doctrine, once a cause of action is recognized, to impose liability on a wrongdoer's principal but not on the wrongdoer."<sup>167</sup> The court further noted that holding the individual wrongdoer responsible advances the goals of deterrence and compensation,<sup>168</sup> particularly when the plaintiff is employed by a governmental agency that enjoys immunity from suit, either under the

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163. *Id.* at 243-45.

164. *See, e.g.,* WIS. STAT. ANN. § 102.35(2)(3) (West Supp. 1985) ("Any employer . . . who . . . , because of a claim or attempt to claim compensation benefits from such employer, discriminates . . . against an employee" shall be subject to an administrative proceeding.).

165. *Darnell v. Impact Indus., Inc.*, 473 N.E.2d 935, 937 (Ill. 1984) ("To hold that the tort of retaliatory discharge requires that the workers' compensation claim be made against the discharging employer would seriously undermine the comprehensive statutory scheme which provides 'for efficient and expeditious remedies for injured employees.'"); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 193-94, 347 N.W.2d 184, 189 (1983) ("The public policy extends to situations such as this where the employee argues an unlawful or retaliatory discharge because he or she filed a workers' compensation claim against any employer, including a previous employer.").

166. *Zurek v. Hasten*, 553 F. Supp. 745, 749 (N.D. Ill. 1982) (plaintiff stated a retaliatory discharge claim against "officials and employees" of the Illinois Commerce Commission); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 493-95, 630 P.2d 186, 191-92 (1981) (plaintiff stated a cause of action against individual officers and employees of defendant city).

167. *Zurek v. Hasten*, 553 F. Supp. 745, 749 (N.D. Ill. 1982).

168. *Id.*

eleventh amendment or under the doctrine of sovereign immunity.<sup>169</sup> In such circumstances, the individual wrongdoer may be the only defendant from whom damages are recoverable.<sup>170</sup>

The third element of the *prima facie* case is proof that the employer's conduct was motivated by unlawful considerations. The plaintiff must establish by a preponderance of the evidence<sup>171</sup> that the defendant discharged the plaintiff for exercising a legal right and not for some other reason.<sup>172</sup> This element is particularly difficult to establish because the plaintiff must prove a negative.<sup>173</sup> The plaintiff's problems are compounded if he or she is required to prove that retaliation was "the sole reason" for the discharge.<sup>174</sup> It is preferable to require the plaintiff to prove that the filing of a workers' compensation claim was either "a substantial factor" or a "determinative factor"<sup>175</sup> in causing the discharge.

Under the "substantial" or "significant" factor test, the plaintiff must prove that retaliation was an important factor motivating the discharge. For example, if the plaintiff was discharged partly because she filed a workers' compensation claim and partly because she often was tardy, the plaintiff could obtain judicial relief for a retaliatory discharge by proving that the filing of the claim was an important motivating fac-

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169. *Id.* For a discussion of the eleventh amendment and the sovereign immunity doctrine, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON].

170. *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 493-94, 630 P.2d 186, 191 (1981) (observing that even a public official may be immune, but only if the official has acted within the scope of his authority and in good faith); see *supra* note 169.

171. See generally Note, Kelsay, *supra* note 28, at 859-61 (rejecting "clear and convincing" standard).

172. See, e.g., *Delano v. City of South Portland*, 405 A.2d 222, 228-29 (Me. 1979) (Plaintiff must show that discharge was "rooted substantially or significantly" in the exercise of his right.); *Galante v. Sandoz, Inc.*, 192 N.J. Super. 403, 407, 470 A.2d 45, 48 (1983) (Plaintiff must show that employer had improper motive.).

173. Krauskopf, *supra* note 19, at 208.

174. See, e.g., *Sabine Pilot Serv. v. Hauck*, 687 S.W.2d 733, 736 (Tex. 1985) (Kilgarlin, J., concurring) (When discharged in retaliation for refusing to perform illegal act, plaintiff must show this was "the only reason" for the discharge.); *DeFord Lumber Co. v. Roys*, 615 S.W.2d 235, 236-37 (Tex. Civ. App. 1981) (There must be evidence from which jury can reasonably infer that workers' compensation claim was "the sole reason" for the discharge.).

175. See, e.g., *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 196-98, 347 N.W.2d 184, 190 (1983); see also *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 559 (Tex. Civ. App. 1981) (An employee need not show he was discharged "solely" on the basis of workers' compensation claim.). See generally Brodin, *supra* note 136, at 293.

The "substantial factor" test is favored by the second *Restatement of Torts*, which states: "The actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm . . ." RESTATEMENT (SECOND) OF TORTS § 431 (1965). For a discussion of the "substantial factor" and "but for" tests of causation in the context of tort law, see PROSSER AND KEETON, *supra* note 169, § 41.

tor. Under the "determinative factor" test, the plaintiff must prove that the employer would not have discharged plaintiff but for the filing of the workers' compensation claim. In the above hypothetical, the plaintiff could satisfy this test only by showing that she would not have been discharged for tardiness alone. Under the "sole factor" test, the plaintiff must prove that retaliation was the only reason for the discharge. In the above hypothetical, the plaintiff would be entitled to judicial relief if she proved that filing a workers' compensation claim was the only reason for the discharge, and that the plaintiff's alleged tardiness in no way influenced the employer's decision. Because employers often make decisions for a variety of reasons, the "sole factor" test tends to insulate an employer from liability for retaliatory discharge. Thus, the "substantial factor" and the "determinative factor" tests are more effective in advancing the objectives of both the workers' compensation scheme and the retaliatory discharge action.

Choosing between the "substantial factor" test and the "determinative factor" test is more difficult. If a court were to adopt the "substantial factor" test in the above hypothetical, it ultimately might order reinstatement of a retaliatory discharge victim whose history of tardiness had created problems for the employer in the past. In other words, the "substantial factor" test might protect the victim of a retaliatory discharge at the expense of an employer ordered to reinstate an employee with a weak performance record. If a court were to adopt the "determinative factor" test, by contrast, the court could order reinstatement of the employee only if the evidence showed that the plaintiff would not have been discharged due to tardiness. The "determinative factor" test thus would protect the employer against the reinstatement of a poor performer. At the same time, it would exonerate an employer who in fact had shown disrespect for the legal rights of an employee who had filed a workers' compensation claim.

Regardless of which test of motivation is selected, two problems arise in obtaining evidence to probe the employer's motivation.<sup>176</sup> First, direct evidence of the employer's state of mind is usually not available; employees most often rely upon circumstantial evidence. Second, the employer enjoys greater access to proof of its own reasons for employment decisions. In an effort to ease the resulting problems of proof in workers' compensation cases, several courts have borrowed burden of proof rules from employment discrimination cases decided under Title

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176. *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1556 (11th Cir. 1983). See generally Note, *Workmen's Compensation*, *supra* note 28, at 645-46.

VII.<sup>177</sup>

Under Title VII, a plaintiff, who has the burden of persuasion on the issue of discriminatory motive, is aided by a presumption that shifts the burden of producing evidence on this issue to the defendant.<sup>178</sup> Courts applying the Title VII presumption to retaliatory discharge cases have held that a plaintiff may establish a prima facie case of retaliatory motive by proving that the employee filed a workers' compensation claim, that the employer had knowledge of the claim, and that the employer discharged the employee.<sup>179</sup> Proof of these three facts creates a rebuttable presumption in favor of the employee that precludes the court from granting a motion for nonsuit or dismissal at the end of the plaintiff's case. The burden of production then shifts to the employer to articulate a legitimate reason for the discharge. If the employer puts on no evidence, the presumption requires that the fact finder must, if it believes the plaintiff's evidence, rule in favor of the plaintiff. If the employer submits relevant admissible evidence denying any retaliatory motive or justifying its actions, the presumption is destroyed and the employee must be given the opportunity to submit additional proof of retaliatory

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177. See, e.g., *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983) (burden of proof on plaintiff to show that filing of workers' compensation claim significant factor in discharge); *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 9, 389 N.E.2d 1075, 1079, 416 N.Y.S.2d 554, 558 (1979) (cites civil rights cases for proposition that burden shifts to defendant after plaintiff makes prima facie showing of retaliatory motive). For a full discussion of the burden of proof issue, see *Davis v. Richmond Special Rd. Dist.*, 649 S.W.2d 252 (Mo. Ct. App. 1983).

178. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

For a discussion of the proof of disparate treatment under Title VII, see B. SCHLEI & P. GROSSMAN, *supra* note 135, at 1286-322; Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Brodin, *supra* note 136; Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U.L. REV. 21 (1983); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979); Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 IND. REL. L.J. 353 (1984) [hereinafter cited as *Furnish, Formalistic Solutions*]; Furnish, *A Path Through the Maze: Disparate Impact Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419 (1982); Kainen & Witherington, *The Standards of Proof in Employment Discrimination Law*, 57 CONN. B.J. 289 (1983); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372 (1982); Terrell, *Employment Discrimination: The Defendant's Burden*, 29 LOY. L. REV. 287 (1983).

179. See, e.g., *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 10, 389 N.E.2d 1075, 1079, 416 N.Y.S.2d 554, 558-59 (1979).



motive or to show that the employer's asserted justification is merely a pretext. At this point, the plaintiff bears both the burdens of production and persuasion on the issue of retaliatory motive. If the plaintiff puts in no further evidence, the defendant will be entitled to a directed verdict. If the plaintiff does put in further evidence, the case will go to the fact finder for a determination as to whether the plaintiff has proven by a preponderance of the evidence that the defendant had a retaliatory motive.

The presumption proposed in this Article<sup>180</sup> is designed to assist the plaintiff in proving that retaliation was *one factor* causing the discharge. If the defendant claims no other motivation for the discharge, the plaintiff who has established the existence of a retaliatory motive is entitled to judicial relief under any one of the substantive tests of motivation.<sup>181</sup> If the defendant claims dual motives, however, the plaintiff must put in additional evidence in order to establish liability for retaliatory discharge. Under the "substantial factor" test, the plaintiff must prove that retaliation was a significant motivating factor.<sup>182</sup> Under the "sole factor" test, the plaintiff must establish that retaliation was the only motivating factor.<sup>183</sup> And under the "determinative factor" test, the plaintiff must show that he or she would not have been discharged but for the filing of the workers' compensation claim.<sup>184</sup>

Most courts in labor law and employment discrimination cases have adopted the "determinative factor" test of motivation when faced with an employer's claim of dual motives.<sup>185</sup> Instead of placing the burden of persuasion on the employee to prove that retaliation was the determinative factor, however, these courts generally place the burden of persuasion on the employer to prove that the employer "would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff" for exercising a legal right.<sup>186</sup>

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180. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 n.5 (1983).

181. See *supra* note 179 & accompanying text.

182. Brodin, *supra* note 136, at 293.

183. *Id.*

184. *Id.*

185. See, e.g., *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552 (11th Cir. 1983). But see *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc) (articulating a "discernable factor" test of motivation in finding that the defendant was liable; ordering the trial court to apply a "same decision" test of causation in fashioning the appropriate remedy). See generally *Furnish, Formalistic Solutions*, *supra* note 178.

186. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). One court has suggested the adoption of this approach in workers' compensation retaliatory discharge actions. *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 10, 389 N.E.2d 1075, 1079, 416 N.Y.S.2d 554, 558-59 (1979); see *infra* notes 216-24 & accompanying text.

There are two typical procedural mechanisms for placing the burden of persuasion on the defendant. One is to create an affirmative defense, which is the approach taken by the National Labor Relations Board ("NLRB") in dual motive cases.<sup>187</sup> The other is to create a presumption regarding an issue in the plaintiff's prima facie case that shifts the burden of persuasion to the defendant.<sup>188</sup> The usual justifications for creating such a presumption are that the defendant has greater access to the evidence or that the defendant is a wrongdoer and should bear the risk of nonpersuasion.<sup>189</sup> Both justifications are applicable in a retaliatory discharge action. Once the plaintiff has proven that retaliation was one factor motivating the discharge, the defendant certainly has greater access to the evidence establishing that the discharge was based primarily on a legitimate motive. And if the plaintiff has proven a retaliatory motive, the defendant has violated the spirit of the workers' compensation law and should be required to bear the risk of nonpersuasion on the "dual motive" justification.

Regardless of which test of causation a court adopts, and regardless of which rules the courts select to govern the burden of proof, employers will advance a variety of justifications for an employee's discharge. These include absenteeism,<sup>190</sup> a concern that the employee will aggravate or reactivate a work-related injury,<sup>191</sup> and a belief that the employee is unable to perform the assigned duties.<sup>192</sup> Other common justifications are a general recession<sup>193</sup> or an economic slump in the employer's trade or business.<sup>194</sup>

Sometimes it is relatively simple for the employee to prove that the employer's justification is a pretext. In one case, for example, the employer had had a written policy to fire anyone who filed a lawsuit against

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187. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

188. See generally PROSSER AND KEETON, *supra* note 169, §§ 38, 40-41, 52 (discussing the use of presumptions to shift the burden of persuasion on the issues of negligence (*res ipsa loquitur* doctrine), causation, and apportionment of damages); Mendez, *supra* note 178.

189. PROSSER AND KEETON, *supra* note 169, §§ 38, 40-41, 52, at 239-42, 258-59, 270-71, 350-51.

190. See, e.g., *Cunningham v. Addressograph Multigraph Corp.*, 87 Ill. App. 3d 396, 398, 409 N.E.2d 89, 90 (1980); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 359, 353 N.W.2d 469, 470 (1984); *Mitchell v. St. Louis County*, 575 S.W.2d 813, 814 (Mo. Ct. App. 1978); *Wilson v. Riverside Hosp.*, 18 Ohio St. 3d 8, 9, 479 N.E.2d 275, 276 (1985).

191. See, e.g., *Sventko v. Kroger Co.*, 69 Mich. App. 644, 650, 245 N.W.2d 151, 154 (1976) (Allen, J., concurring).

192. See, e.g., *McKiness v. Western Union Tel. Co.*, 667 S.W.2d 738, 740 (Mo. Ct. App. 1984).

193. See, e.g., *Brewster v. C.H. Liebfried Mfg. Corp.*, 65 A.D.2d 162, 164, 411 N.Y.S.2d 413, 414 (1978).

194. See, e.g., *Smith v. Mallory Timers Co.*, 97 A.D.2d 571, 468 N.Y.S.2d 74 (1983).

the company.<sup>195</sup> Although the employer removed this directive from the employee handbook prior to the plaintiff's discharge, the employee was able to prove that the policy in fact had been continued informally.<sup>196</sup> In other cases of alleged pretext, the evidence is sparse, and it is difficult for the fact finder to ascertain the true cause of the discharge.<sup>197</sup> To counter this difficulty, one court has recommended that, in the future, the employer set forth reasons in writing in order to establish clearly that "no attempt was made to dissuade the injured employee from filing a claim" and that the discharge was "in no way retaliatory."<sup>198</sup>

Some courts have responded favorably to employers' asserted justifications for discharging employees. In the New York case of *Brewster v. C.H. Liebfried Manufacturing Corp.*,<sup>199</sup> for example, the court held that the employee was discharged "because of a lack of work and general economic conditions."<sup>200</sup> The court cautioned that "[d]iscrimination works both ways and, while discrimination against employees who file compensation claims should not be countenanced, the allegation of discrimination should not become a sword without just cause."<sup>201</sup>

Many employers have attempted to strengthen their position on the issue of motivation by adopting company policies regarding such matters as absenteeism. Their theory is that the discharge of an injured employee for absenteeism will be justified more clearly by the existence of an explicit company rule. At first, the courts tended to regard these policies as "irrelevant."<sup>202</sup> More recently, however, courts<sup>203</sup> and legislatures<sup>204</sup> have given greater weight to proof of an employee's violation of a valid company policy. In the words of a New Jersey court, "to preclude the

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195. *Collier v. Pellerin Milnor Corp.*, 463 So. 2d 47, 48-49 (La. Ct. App. 1985).

196. *Id.*

197. *E.g.*, *Ducote v. J.A. Jones Constr. Co.*, 471 So. 2d 704, 706-07 (La. 1985) (judgment for plaintiff affirmed); *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 389 N.E.2d 1075, 416 N.Y.S.2d 554 (1979) (judgment for plaintiff affirmed).

198. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 650-51, 245 N.W.2d 151, 154-55 (1976) (Allen, J., concurring).

199. 65 A.D.2d 162, 411 N.Y.S.2d 413 (1978).

200. *Id.* at 164, 411 N.Y.S.2d at 414.

201. *Id.*

202. *See, e.g.*, *Lo Dolce v. Regional Transit Serv.*, 77 A.D.2d 697, 429 N.Y.S.2d 505 (1980); *accord* *Griffin v. Eastman Kodak Co.*, 80 A.D.2d 689, 436 N.Y.S.2d 441 (1981).

203. *See, e.g.*, *Cunningham v. Addressograph Multigraph Corp.*, 87 Ill. App. 3d 396, 397-98, 409 N.E.2d 89, 90-91 (1980) (discharge was not retaliatory, but for failure to report absence); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 360, 353 N.W.2d 469, 471 (1984) (Workers' compensation law does not prohibit discharge for injury-related absence.); *Galante v. Sandoz, Inc.*, 192 N.J. Super. 403, 407-09, 470 A.2d 45, 47-48 (1983) (Workers' compensation law does not preclude the neutral application of an absence control policy.).

204. *E.g.*, N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986).

neutral application of an absence control policy by an employer to an employee who was once injured in a work-related accident is to confer upon the employee a benefit not contemplated by the legislature; namely, unlimited absences from work with impunity."<sup>205</sup> The court emphasized that if an employee were fired after one absence resulting from a work-related injury, "such an eventuality would smack more of a retaliatory response."<sup>206</sup> As the instances of absence begin to multiply, however, "the likelihood of evidence supporting a retaliatory firing may begin to dissipate substantially."<sup>207</sup>

Some jurisdictions, either by judicial decision<sup>208</sup> or by statute,<sup>209</sup> have attempted to strike a balance between the needs of the injured employee and the employer. These jurisdictions have provided that a worker who has sustained a compensable injury shall be reinstated upon demand, "provided that the position is available and the worker is not disabled from performing the duties of such position."<sup>210</sup> These provisions contrast with the original language of the North Carolina statute: "The failure of an employer to continue to employ . . . an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation of this [retaliatory discharge] section."<sup>211</sup> This language, in effect, treats all recipients of permanent partial disability benefits as a class, removing from them the protection of the retaliatory discharge statute, even though many individuals within the class may be capable of continuing to work.<sup>212</sup> The North Carolina legis-

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205. *Galante v. Sandoz, Inc.*, 192 N.J. Super. 403, 409, 470 A.2d 45, 48 (1983) (summary judgment for employer). In *Galante*, the court also said that "[u]ntil the legislature requires, as a matter of policy, that absences related to on the job injuries must be recognized as excused lost time, the employee is left to pursuing the remedy of showing that he is the victim of a retaliatory dismissal." *Id.* at 412, 470 A.2d at 50.

206. *Id.* at 411, 470 A.2d at 49.

207. *Id.*

208. See, e.g., *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 664, 586 P.2d 564, 569, 150 Cal. Rptr. 250, 255 (1978).

209. See, e.g., OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983). In *Shaw v. Doyle Milling Co.*, 297 Or. 251, 255, 683 P.2d 82, 83-84 (1984), the court construed the Oregon statute to require reinstatement of an employee two years after his injury. The court emphasized that the statute was part of a broader legislative scheme to afford employment opportunity and security to the handicapped.

210. OR. REV. STAT. § 659.415 (1983); see also HAWAII REV. STAT. § 378-32(2) (Supp. 1984); N.J. STAT. ANN. § 34.15-39.1 (West Supp. 1985); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1985); WIS. STAT. ANN. § 102.35 (West Supp. 1985).

211. N.C. GEN. STAT. § 97-6.1(e) (1979).

212. The legislative history behind the enactment of the North Carolina statute is chronicled in Note, *Workmen's Compensation*, *supra* note 28, at 644 & n.10.

lature amended its statute in 1985 to correct this problem.<sup>213</sup> The statute now provides: "The failure of an employer to continue to employ . . . an employee who receives compensation for . . . a permanent partial disability interfering with his ability to adequately perform work available, shall in no manner be deemed a violation of this section."<sup>214</sup> Thus North Carolina has joined the trend toward requiring reinstatement of a previously injured worker, provided the worker is qualified to perform the job.

## Defenses

The most frequently asserted defenses to a retaliatory discharge action are the statute of limitations and preemption by federal labor laws or preclusion by the terms of a collective bargaining agreement.<sup>215</sup> North Carolina's retaliatory discharge statute is unique because it establishes "affirmative defenses" based on the employee's misconduct.<sup>216</sup> The statute provides:

Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of an employer's property; or for failure to meet employer work standards not related to the Workers' Compensation claim; or malingering; or embezzlement or larceny of employer's property; or for violating specific written company policy of which the employee has been previously warned and for which the action is a stated remedy of such violation.<sup>217</sup>

These "affirmative defenses" overlap with some of the employer's "justifications" for discharging an employee discussed above under the issue of motivation.<sup>218</sup> If the plaintiff's misconduct is characterized as an affirmative defense, the employer has the burdens of pleading and persuasion on the issue of whether there was a legitimate reason for the discharge.<sup>219</sup> The successful assertion of an affirmative defense precludes the plaintiff from establishing liability. By contrast, if the plaintiff's misconduct is regarded as relevant to the issue of motivation, which is part of the plaintiff's *prima facie* case, the plaintiff has the burdens of plead-

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213. N.C. GEN. STAT. § 97-6.1(e) (1985).

214. *Id.*

215. See *infra* notes 225-51 & accompanying text. The exclusive remedy clause of a workers' compensation statute is a defense only if the statute creates a civil remedy for retaliatory discharge and makes it the workers' exclusive remedy. See *supra* notes 54-56, 70-82 & accompanying text.

216. N.C. GEN. STAT. § 97-6.1(c) (1985).

217. *Id.*

218. See *supra* notes 190-94 & accompanying text.

219. Note, *Workmen's Compensation*, *supra* note 28, at 645.

ing and persuasion.<sup>220</sup> Of course, either burden may be shifted to the employer through the use of presumptions on the ground that the employer has greater access to the evidence regarding the issues of motivation.<sup>221</sup>

It is true that the National Labor Relations Board, like the North Carolina legislature, has created an affirmative defense to deal with an employer's claim that there was a legitimate reason for discharging an employee.<sup>222</sup> Tort law, however, usually creates presumptions to place the burden of persuasion on the defendant regarding an issue that is part of the plaintiff's *prima facie* case.<sup>223</sup> For that reason, this Article recommends the use of presumptions rather than affirmative defenses to regulate the burden of persuasion on issues relevant to the employer's motivation.

In the event that an employer is granted an affirmative defense on the issue of justification, however, it is important to note the relationship between the proposed affirmative defense and the substantive test of motivation.<sup>224</sup> For example, under the North Carolina statute, the employer may establish an affirmative defense simply by proving that the plaintiff's misconduct was one factor motivating the discharge. The effect of this language is to adopt the "sole factor" test of motivation, which conditions liability on a finding that retaliation was the only factor motivating the discharge. It would have been preferable for the North Carolina legislature to have couched its affirmative defense in the language of either the "determinative factor" or the "substantial factor" test. Under the "determinative factor" test of motivation, the legislature should have provided that the employer could avoid liability by proving that the employer would have discharged the employee for one of the statutory justifications, even if the employee had not filed a workers' compensation claim. And under the "substantial factor" test, the legislature should have exonerated the employer from liability upon proof that one or more of the statutory justifications was such a significant reason for the discharge that the filing of the workers' compensation claim was no more than a minor factor.

Every jurisdiction recognizes the statute of limitations as an affirma-

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220. See *supra* notes 171-73 & accompanying text. In other words, the plaintiff must prove by a preponderance of the evidence that the misconduct was insufficient to justify the discharge.

221. See *supra* notes 178-79, 188-89 & accompanying text.

222. See *supra* note 187 & accompanying text.

223. See *supra* notes 188-89 & accompanying text.

224. The various substantive tests of motivation are defined *supra* notes 174-75 & accompanying text.

tive defense. The critical issue concerns which statute of limitations should be applied to a retaliatory discharge action. If the action is brought under the common law, courts must choose between a contract and a tort statute of limitations. The courts have uniformly applied a tort statute of limitations.<sup>225</sup> One dissenting judge in Indiana, however, has argued that the contract statute of limitations should apply on the theory that workers' compensation legislation is a mandatory term of every employment contract.<sup>226</sup> The tort statute of limitations is appropriate because the cause of action is intended to punish the defendant for violating the spirit of workers' compensation legislation as well as to compensate the employee for his or her resulting losses, including noneconomic losses.<sup>227</sup> As a general rule, neither punitive damages nor general damages for nonphysical harm are recoverable in a breach of contract action.<sup>228</sup>

Assuming that a tort statute of limitations should apply, a court also must determine whether the case is controlled by the statute governing "personal injury" actions or by a longer statute of limitations governing other types of tort actions. The courts uniformly have refused to apply the personal injury statute on the ground that the harm caused by a retaliatory discharge is not primarily a personal injury, but rather an "economic"<sup>229</sup> and "emotional" loss.<sup>230</sup>

Employers have been concerned about the relatively long statutes of limitations governing common-law retaliatory discharge actions. As a result, some legislatures that have created a statutory cause of action or an administrative remedy have enacted shorter statutes of limitations. In California, for example, the employee must claim an administrative remedy within one year from the date of the employee's termination.<sup>231</sup> In Ohio and North Carolina, employees must file statutory causes of action

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225. *Scott v. Union Tank Car Co.*, 402 N.E.2d 992, 993 (Ind. Ct. App. 1980); *Arvie v. Century Tel. Enter., Inc.*, 452 So. 2d 392, 394 (La. Ct. App. 1984); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 182 (W. Va. 1980).

226. *Scott v. Union Tank Car Co.*, 402 N.E.2d 992, 993-97 (Ind. Ct. App. 1980) (Staton, J., dissenting).

227. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181-88, 384 N.E.2d 353, 357-60 (1978); *Lally v. Copygraphics, Inc.*, 173 N.J. Super. 162, 179-81, 413 A.2d 960, 968-69 (1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981); *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519, 522-23 (Okla. 1985); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

228. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.4, at 817-21 (1973).

229. *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 682-83 (W. Va. 1981) (characterizing retaliatory discharge as analogous to a fraud action).

230. *Brown v. Physicians Mut. Ins. Co.*, 679 S.W.2d 836, 839 (Ky. Ct. App. 1984) (Plaintiff's complaint prayed for mental anguish damages as well as lost earnings.).

231. CAL. LAB. CODE § 132a (West Supp. 1986).

within six months<sup>232</sup> and one year,<sup>233</sup> respectively. In Hawaii, the employee must claim an administrative remedy within thirty days of the discharge, or thirty days after the employee learns of the discharge, except that the employee who is discharged while still unable to work also may file a complaint within thirty days of the date the employee is able to return to work.<sup>234</sup>

The other affirmative defenses most often raised in retaliatory discharge actions are preemption by federal labor laws and preclusion by the terms of a collective bargaining agreement.<sup>235</sup> Recent decisions, however, uniformly have rejected these defenses in actions by workers' compensation claimants.<sup>236</sup>

The National Labor Relations Act ("NLRA") provides that employees shall have "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." <sup>237</sup> The NLRA also provides that it shall be an unfair

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232. OHIO REV. CODE ANN. § 4123.90 (Page 1980).

233. N.C. GEN. STAT. § 97-6.1(f) (1985).

234. HAWAII REV. STAT. § 378-33(b) (Supp. 1984).

235. See generally Pincus & Gillman, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of the "At Will" Doctrine?*, 59 CHL.-[KENT L. REV. 1007 (1983); Silzer, *Workers' Compensation: Retaliatory Discharge of Employees Covered by a Collective Bargaining Agreement*, 70 ILL. B.J. 164 (1981); Comment, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption*, 71 CALIF. L. REV. 942 (1983); Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635 (1983); Annot., 32 A.L.R.4TH 350 (1984) (failure to pursue or exhaust remedies under union contract as affecting employee's right of state civil action for retaliatory discharge).

236. See, e.g., *Peabody Galion v. Dollar*, 666 F.2d 1309, 1316, 1320 (10th Cir. 1982) (Oklahoma statute not preempted by federal law and action under statute not precluded by collective bargaining agreement); *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 665, 586 P.2d 564, 568, 150 Cal. Rptr. 250, 254 (1978) (employer claim of preclusion by collective bargaining agreement "specious" when union regularly waived provisions with respect to injured workers); *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 412, 207 Cal. Rptr. 663, 669 (1984) (no preemption by 29 U.S.C. § 157 (1982) in absence of "concerted activity"); *Puchert v. Agsalud*, 67 Hawaii 25, 29-33, 677 P.2d 449, 455-56 (1984) (rejecting claims of federal preemption and preclusion by agreement), *appeal dismissed sub nom.* *Pan Am. World Airways v. Puchert*, 105 S. Ct. 2693 (1985); *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1283 (Ill. 1984) (tort remedy of retaliatory discharge not precluded by existence of contract remedy provided by collective bargaining agreement), *cert. denied*, 105 S. Ct. 3513 (1985); *Carnation Co. v. Borner*, 610 S.W.2d 450, 452-53 (Tex. 1981) (no preclusion by collective bargaining agreement when employer "ignored" agreement in handling grievance claim and no settlement was reached on grievance). But see *Herring v. Prince Foods-Canning Div.*, 611 F. Supp. 177, 181 (D.C.N.J. 1985) (predicting that New Jersey Supreme Court would require exhaustion of arbitration procedures, but failing to discuss and distinguish above-cited cases).

237. 29 U.S.C. § 157 (1982).



labor practice for an employer to interfere with an employee's exercise of these rights.<sup>238</sup> When an activity is even arguably protected or prohibited under the NLRA, the United States Supreme Court has ruled that state law may not govern that activity.<sup>239</sup> The question is whether filing a workers' compensation claim is a "concerted activity" within the meaning of the NLRA, and, if so, whether discharging an employee who has filed a workers' compensation claim is an interference with the exercise of that activity.<sup>240</sup>

For some time, the National Labor Relations Board took the position that pursuit of a workers' compensation claim was "constructive concerted activity" because workers' compensation benefits arise out of the employment relationship and are of common interest to other employees.<sup>241</sup> In 1984, the NLRB abandoned the "constructive concerted activity" theory, however, and adopted in its place a test that requires proof of actual concerted activity.<sup>242</sup> Consequently, in *Meyer v. Byron Jackson, Inc.*,<sup>243</sup> a California appellate court held that the NLRA did not preempt the plaintiff's state law cause of action for retaliatory discharge because the plaintiff was not engaged in a concerted activity.<sup>244</sup> Two federal courts of appeals now have ordered the NLRB to reexamine its literal test of concerted activity.<sup>245</sup> It remains to be seen whether the Board will adopt a test of concerted activity that preempts the filing of state law retaliatory discharge actions or whether the Board will allow the states to

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238. *Id.* § 158(a)(1).

239. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

240. *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 411, 207 Cal. Rptr. 663, 668 (1984) (citing *NLRB v. City Disposal Sys., Inc.*, 104 S. Ct. 1505, 1507 (1984)).

241. *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 411-12, 207 Cal. Rptr. 663, 668-69 (1984) (citing *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980)).

242. *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 412, 207 Cal. Rptr. 663, 669 (1984) (citing *Meyers Indus., Inc. & Kenneth Prill*, 268 N.L.R.B. 73 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985)). The *Meyers* decision subsequently was reversed and remanded for reconsideration of the phrase "concerted activity" in *Prill v. NLRB*, 755 F.2d 941, 953 (D.C. Cir. 1985). See also *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985). Neither *Prill* nor *Ewing* involved an employee who had been discharged for filing a workers' compensation claim.

243. 161 Cal. App. 3d 402, 207 Cal. Rptr. 663 (1984).

244. *Id.* at 412, 207 Cal. Rptr. at 669; see also *Peabody Galion v. Dollar*, 666 F.2d 1309, 1316 (10th Cir. 1982) (applying Oklahoma's workers' compensation law).

245. *Meyer*, 161 Cal. App. 3d at 412, 207 Cal. Rptr. at 669; see *supra* note 242. Recent commentary discussing the meaning of concerted activity includes Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board*, 59 IND. L.J. 583 (1984); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981); Recent Development, *The Supreme Court Takes One Step Forward and the NLRB Takes One Step Backward: Redefining Constructive Concerted Activities*, 38 VAND. L. REV. 1295 (1985).

develop remedies to deter employers from abusing their power over individual employees who are asserting state-created legal rights.

If a plaintiff claiming retaliatory discharge is a union member covered by a collective bargaining agreement, the employer may contend that the plaintiff is required to pursue the grievance remedies provided by the agreement.<sup>246</sup> But the courts generally have held that a collective bargaining agreement does not bar an employee's tort action for retaliatory discharge.<sup>247</sup> In *Midgett v. Sackett-Chicago, Inc.*,<sup>248</sup> the Illinois Supreme Court observed that a union employee's grievance usually will go to arbitration. If the arbitrator finds no just cause for the employee's discharge, the remedy simply will be reinstatement and an award of back pay. The arbitrator is not empowered to award punitive damages.<sup>249</sup> Therefore, the court ruled that the action for retaliatory discharge could go forward despite the collective bargaining agreement: "If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against a violator of an important public policy of this State."<sup>250</sup> The court also took the position that it would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee.<sup>251</sup>

## Remedies

The tort of retaliatory discharge takes place within the context of an employment relationship, and therefore the remedies should reflect the policies of tort and contract law. Both legal and equitable remedies should be available so that the plaintiff may request reinstatement in addition to compensatory and punitive damages. Furthermore, because the tort arises in the context of workers' compensation legislation, a wrongfully discharged claimant should have a right to an administrative remedy. That remedy could be available either in lieu of, or in addition to, the tort action.<sup>252</sup>

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246. *Midgett v. Sackett-Chicago, Inc.*, 118 Ill. App. 3d 7, 8, 454 N.E.2d 1092, 1093 (1983), *aff'd*, 473 N.E.2d 1280 (Ill. 1984), *cert. denied*, 105 S. Ct. 3513 (1985).

247. *See supra* note 236.

248. 473 N.E.2d 1280 (Ill. 1984), *cert. denied*, 105 S. Ct. 3513 (1985).

249. *Id.* at 1284.

250. *Id.*

251. *Id.* at 1283-84.

252. For a discussion of alternative and cumulative tort actions, see Love, *Actions for Non-physical Harm: The Relationship Between the Tort System and No-Fault Compensation (With*

There has been little judicial discussion of potential remedies for the tort of retaliatory discharge.<sup>253</sup> Most appellate courts simply have not been asked to consider the issue because most of the cases they have heard have involved preliminary issues, such as whether the plaintiff's complaint states a cause of action<sup>254</sup> and, if so, whether the claim is barred by a statute of limitations<sup>255</sup> or preempted by federal labor law.<sup>256</sup>

The states that have enacted statutory causes of action have been forced to consider the remedies issues.<sup>257</sup> A few states have authorized only legal relief.<sup>258</sup> For example, Minnesota's retaliatory discharge statute provides for "a civil action for damages incurred by the employee . . . , including attorney fees" and punitive damages "not to exceed three times the amount of any compensation benefit to which the employee is entitled."<sup>259</sup> Other states have authorized only the equitable remedy of reinstatement with back pay.<sup>260</sup> A more recent trend is to provide for both reinstatement with back pay and "reasonable"<sup>261</sup> or "actual" damages.<sup>262</sup> Connecticut's statute, which became effective in 1984, provides the most comprehensive remedial scheme.<sup>263</sup> It creates a civil cause of action for both legal and equitable relief or, in the alternative, an administrative remedy. Because of its comprehensiveness, Connecticut's statute most

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*an Emphasis on Workers' Compensation*), 73 CALIF. L. REV. 857 (1985) [hereinafter cited as *Love, Actions*]; *Love, Punishment and Deterrence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C.D. L. REV. 231 (1983).

253. For cases that have discussed the remedies issue in some depth, see *Malik v. Apex Int'l Alloys, Inc.*, 762 F.2d 77, 80-81 (10th Cir. 1985); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186-90, 384 N.E.2d 353, 359-61 (1978); *Wojciak v. Northern Package Corp.*, 310 N.W.2d 675, 679-81 (Minn. 1981); *Carnation Co. v. Borner*, 610 S.W.2d 450, 453-55 (Tex. 1981).

254. See, e.g., *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 249-50, 297 N.E.2d 425, 426 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 646, 245 N.W.2d 151, 152 (1976).

255. See *supra* notes 225-34 & accompanying text.

256. See *supra* notes 237-51 & accompanying text.

257. The following statutes define civil remedies for statutory retaliatory discharge actions: CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985); MINN. STAT. ANN. § 176.82 (West Supp. 1985); MO. ANN. STAT. § 287.780 (Vernon Supp. 1986); N.C. GEN. STAT. § 97-6.1 (1985); OHIO REV. CODE ANN. § 4123.90 (Page 1980); OKLA. STAT. ANN. tit. 85, § 6 (West Supp. 1985); OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986); VA. CODE § 65.1-40.1 (Supp. 1985).

258. MINN. STAT. ANN. § 176.82 (West Supp. 1985); MO. ANN. STAT. § 287.780 (Vernon Supp. 1986).

259. MINN. STAT. ANN. § 176.82 (West Supp. 1985).

260. OHIO REV. CODE ANN. § 4123.90 (Page 1980); OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983).

261. N.C. GEN. STAT. § 97-6.1 (1985); OKLA. STAT. ANN. tit. 85, §§ 5-6 (West Supp. 1985); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986).

262. VA. CODE § 65.1-40.1 (Supp. 1985).

263. CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985).

successfully has accomplished the objectives of providing a plaintiff with the full panoply of legal and equitable relief.

The Connecticut statute provides:

(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter.

(b) Any employee who is so discharged or discriminated against may either: (1) Bring a civil action in the superior court for the judicial district where the employer has its principal office for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if he had not been discriminated against or discharged and any other damages caused by such discrimination or discharge. The court may also award punitive damages. Any employee who prevails in such a civil action shall be awarded reasonable attorney's fees and costs to be taxed by the court; or (2) file a complaint with the chairman of the workers' compensation commission alleging violation of the provisions of subsection (a) of this section. Upon receipt of any such complaint, the chairman shall select a commissioner to hear the complaint, provided any commissioner who has previously rendered any decision concerning the claim shall be excluded. The hearing shall be held in the workers' compensation district where the employer has its principal office. After the hearing, the commissioner shall send each party a written copy of his decision. The commissioner may award the employee the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he otherwise would have been eligible if he had not been discriminated against or discharged. Any employee who prevails in such a complaint shall be awarded reasonable attorney's fees. Any party aggrieved by the decision of the commissioner may appeal the decision to the appellate court.<sup>264</sup>

The Connecticut statute authorizes the plaintiff to obtain legal relief in the form of compensatory and punitive damages. The compensatory damages include both economic losses, such as back wages and employee benefits, and "other damages," which presumably include damages for emotional distress and other noneconomic losses.

In assessing economic losses, the courts should be attuned to the measure of recovery for the breach of an employment contract.<sup>265</sup> Even though the cause of action lies in tort, the primary economic loss is

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264. *Id.*

265. See generally D. DOBBS, *supra* note 228, § 12.25, at 924-31; Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984). The employment contract can be express or implied.

caused by the employer's termination of the employment contract.<sup>266</sup> Therefore, the plaintiff should be entitled to receive whatever sums would have been due under the express or implied employment contract from the date of discharge to the time of trial.<sup>267</sup> If the plaintiff's employment contract is for a specified term, and if the court does not grant reinstatement, the plaintiff also should receive future lost wages, reduced to present value.<sup>268</sup> In addition, the plaintiff should be entitled to recover the value of lost employment benefits and any other consequential economic losses caused by the breach, such as expenses related to finding new employment and moving expenses.<sup>269</sup> The employer should have the burden of asserting that the plaintiff could have mitigated his or her damages.<sup>270</sup> If the plaintiff has obtained a substitute job, the plaintiff's damages should be offset by the proceeds from that job.<sup>271</sup>

Plaintiffs also should be able to recover compensatory damages for noneconomic losses. These damages should be assessed in accord with tort precedents.<sup>272</sup> Thus, a plaintiff who experiences mental anguish, humiliation, or emotional distress due to the retaliatory discharge should be entitled at least to actual damages,<sup>273</sup> and perhaps to presumed damages for the dignitary wrong as well.<sup>274</sup> The plaintiff should not be required to prove resulting physical manifestations of emotional distress because re-

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266. See Annot., 44 A.L.R.4TH 1131 (1986).

267. The primary component of this loss is back pay. See, e.g., *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 409-10, 207 Cal. Rptr. 663, 667-68 (1984); *Shaw v. Doyle Milling Co.*, 297 Or. 251, 254, 683 P.2d 82, 83 (1984).

268. The primary component of this relief is known as front pay. See, e.g., *Carnation Co. v. Borner*, 610 S.W.2d 450, 453-54 (Tex. 1981).

269. *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1285 (Ill. 1984), cert. denied, 105 S. Ct. 3513 (1985); *Collier v. Pellerin Milnor Corp.*, 463 So. 2d 47, 49-50 (La. Ct. App. 1985); *Vigil v. Arzola*, 699 P.2d 613, 620 (N.M. Ct. App. 1983).

270. For a discussion of the policy considerations that justify placing the burden of proof on the employer, see D. DOBBS, *supra* note 228, § 12.25, at 924-25.

271. See, e.g., *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 207 Cal. Rptr. 663 (1984); *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983); *DeFord Lumber Co. v. Roys*, 615 S.W.2d 235, 237 (Tex. Civ. App. 1981). For a discussion of the employee's measure of damages in a wrongful discharge action, see Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L.J. 207 (1981).

272. See generally D. DOBBS, *supra* note 228, §§ 7.1, .3, at 509-10, 528-32.

273. See, e.g., *Malik v. Apex Int'l Alloys, Inc.*, 762 F.2d 77 (10th Cir. 1985) (applying Oklahoma law and affirming verdict for actual damages); *Meyer v. Byron Jackson, Inc.*, 161 Cal. App. 3d 402, 207 Cal. Rptr. 663 (1984) (affirming verdict for emotional distress damages); *Boyles v. Greater Peoria Mass Transit*, 133 Ill. App. 3d 588, 479 N.E.2d 7 (1985) (allowing compensatory damages to be recovered in tort because tort damages allow for greater recovery than labor law remedies).

274. For a discussion of presumed damages for dignitary wrongs, see Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979).

taliatory discharge, by definition, is an intentional tort action.<sup>275</sup> The proper analogy is to the action for intentional infliction of emotional distress, and not to the action for negligent infliction of emotional distress.<sup>276</sup>

Finally, punitive damages should be recoverable by the retaliatory discharge claimant.<sup>277</sup> Compensatory awards often are small,<sup>278</sup> and one of the most important functions of the retaliatory discharge tort is to punish the employer for past misconduct and to deter future misconduct.<sup>279</sup> Virtually every jurisdiction that has recognized the retaliatory discharge action has authorized the recovery of punitive damages.<sup>280</sup> To date, however, most jurisdictions have not actually assessed punitive damages against the defendant on the ground that the defendant had no advance warning that its conduct would be characterized as tortious.<sup>281</sup>

Compensatory and punitive damages do not constitute adequate remedies if the plaintiff desires reinstatement. Therefore, in addition to these legal remedies, the Connecticut statute authorizes the claimant to seek equitable relief.<sup>282</sup> The traditional rule is that equity will not order specific performance of a personal service contract.<sup>283</sup> That rule is not enforced, however, when the employer has violated the employee's constitutional rights and the employee seeks specific performance of the employment contract.<sup>284</sup> Similarly, in the case of a retaliatory discharge, the employer has violated the employee's statutory rights, and the em-

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275. *Malik v. Apex Int'l Alloys, Inc.*, 762 F.2d 77, 80-81 (10th Cir. 1985); see also *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 701-02 (W. Va. 1982).

276. For a discussion of intentional infliction of emotional distress, see PROSSER AND KEETON, *supra* note 169, § 12.

277. See generally Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985).

278. *E.g.*, *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 178, 384 N.E.2d 353, 355 (1978) (court awarded \$749 in compensatory damages).

279. *Id.* at 181-88, 384 N.E.2d at 357-60.

280. See, *e.g.*, *id.* at 186-88, 384 N.E.2d at 359-60; *Lally v. Copygraphics*, 85 N.J. 668, 670, 428 A.2d 1317, 1318 (1981); *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519, 522-23 (Okla. 1985); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984). See generally Annot., 44 A.L.R.4TH 1131, §§ 13, 15 (1986). For a discussion of the right to recover punitive damages under statutory retaliatory discharge tort actions, see *supra* notes 104-11 & accompanying text.

281. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 187-90, 384 N.E.2d 353, 360-61 (1978).

282. CONN. GEN. STAT. ANN. § 31-290a (West Supp. 1985).

283. See generally D. DOBBS, *supra* note 228, § 12.25, at 929-31.

284. *E.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493-95 (1985); *Endress v. Brookdale Community College*, 144 N.J. Super. 109, 129-30, 364 A.2d 1080, 1090-91 (1976). See generally Linzer, *On the Amoralty of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 128 (1981) (approving *Endress*).

ployee should be entitled to equitable relief against the employer.<sup>285</sup>

The plaintiff should be entitled to preliminary injunctive relief whenever it is appropriate.<sup>286</sup> A wrongfully discharged employee may be harmed irreparably by waiting a year or more for reinstatement following a trial on the merits of the retaliatory discharge action.<sup>287</sup> Although no court has yet issued a preliminary injunction to reinstate a workers' compensation claimant, such relief has been accorded to plaintiffs alleging retaliatory discharge under Title VII.<sup>288</sup> These cases should provide a useful precedent to workers' compensation claimants seeking immediate reinstatement.

In addition to recognizing a civil cause of action for legal and equitable relief, the Connecticut statute creates an alternative administrative remedy.<sup>289</sup> The relief authorized comprises both reinstatement and back pay.<sup>290</sup> The claimant who seeks administrative relief is not allowed to recover compensatory or punitive damages. The trade-off, however, is that the administrative remedy may be more expeditious and less costly.

An administrative remedy should be provided by statute, particularly in those jurisdictions where it takes several years to bring a civil case to trial. Instead of making the administrative remedy an alternative to a tort action, however, legislatures should consider making it a cumulative remedy.<sup>291</sup> Such an approach would permit an employee to recover back pay and reinstatement through the administrative proceeding

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285. See, e.g., N.C. GEN. STAT. § 97-6.1 (1985); OHIO REV. CODE ANN. § 4123.90 (Page 1980); OKLA. STAT. ANN. tit. 85, § 6 (West Supp. 1985); OR. REV. STAT. §§ 659.121, .410, .415, .420 (1983); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1986); VA. CODE § 65.1-40.1 (Supp. 1985).

By way of analogy, a finding of intentional discrimination in violation of Title VII "presumptively entitles the plaintiff to reinstatement." *Henry v. Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985).

286. See generally R. LEAVELL, J. LOVE & G. NELSON, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES*, ch. 2, § 1(C) (4th ed. 1986).

287. See generally Ashtor, *The Availability of Preliminary Injunctive Relief to Private Plaintiffs Pending Equal Employment Opportunity Commission Action Under Title VII of the Civil Rights Act of 1964*, 8 LOY. U. CHI. L.J. 51 (1976); Jauvtis, *Sidestepping the EEOC: Granting Preliminary Injunctive Relief to Private Plaintiffs*, 9 EMPLOYEE REL. L.J. 485 (1983-1984); Richards, *Preliminary Relief in Employment Discrimination Cases*, 66 KY. L. REV. 39 (1977).

288. 42 U.S.C. § 2000e-5(g) (1982); see, e.g., *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 879 (2d Cir. 1981); *Drew v. Liberty Mut. Ins. Co.*, 480 F.2d 69, 72 (5th Cir. 1973), *cert. denied*, 417 U.S. 935 (1974).

289. CONN. GEN. STAT. ANN. § 31-290a(b)(2) (West Supp. 1985).

290. *Id.*

291. For a discussion of the advantages of a cumulative remedy approach, see Love, *Actions*, *supra* note 252, at 876-79, 896-97.

without barring the employee's tort claim for punitive damages and compensatory damages for noneconomic losses.

The cumulative remedy approach particularly suits retaliatory discharge claims. The defendants are employers who have violated the spirit of the workers' compensation laws by discharging employees who have claimed benefits for work-related injuries. The plaintiffs are employees who have been deprived not only of compensation for their injuries, but also of their jobs. Professor Larson correctly characterizes the conduct of the defendants in retaliatory discharge actions as "contemptible."<sup>292</sup> The cumulative remedy approach allows the plaintiffs to seek swift reinstatement and back pay through the administrative process. At the same time, it permits the plaintiffs to file contemporaneous tort claims for damages that will serve to deter and to punish the defendants' contemptible conduct. There is no danger of double recovery, however, because back pay would be recoverable exclusively in the administrative proceeding, while other types of compensatory damages and punitive damages would be recoverable exclusively in the tort action. The administrative remedy would be easy to implement because every jurisdiction already has established some type of administrative tribunal to adjudicate workers' compensation claims. That same tribunal could be designated to process the retaliatory discharge claims of workers' compensation claimants.

A "cumulative remedy" favors the employee. The "alternative remedy" prescribed by the Connecticut statute, by contrast, favors the employer because it eliminates the threat of punitive damages if the employee elects the administrative remedy. Since the employer in a retaliatory discharge case is being charged with intentional wrongdoing, the "cumulative remedy," favoring the employee, provides more complete relief for the full range of wrongs encompassed by the retaliatory discharge action.

### Conclusion

Since 1973, the tort of retaliatory discharge for filing a workers' compensation claim has evolved through an interactive process between the courts and the state legislatures. This Article has traced the contours of the *prima facie* case, identified the affirmative defenses, and recommended a spectrum of legal and equitable remedies for the wrongfully discharged workers' compensation claimant.

Although the Article focuses on retaliatory discharge actions in the

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292. 2A A. LARSON, *supra* note 1, § 68.36(a), at 13-93 (1983).



context of workers' compensation claimants, it should provide useful insights with respect to all types of retaliatory discharge actions. Once a court has determined that an employer has discriminated against an employee in retaliation for some type of protected conduct, the remaining issues of the *prima facie* case are the same, regardless of the reason for the discrimination. First, what conduct by an employer qualifies as an actionable discharge? And second, was the worker discharged for exercising a legal right, or for some other reason? Similarly, the defenses are the same for any type of retaliatory discharge action. The court will have to determine which statute of limitations is applicable and whether the action is preempted by federal labor laws or precluded by the terms of a collective bargaining agreement. Finally, the same remedial principles apply to all retaliatory discharge actions. Plaintiffs will usually request legal relief in the form of compensatory and punitive damages. The measure of recovery recommended in this Article can apply to any retaliatory discharge action. Plaintiffs may also seek reinstatement. This Article has recommended that such relief be made available through either equitable or administrative proceedings. Although courts do not ordinarily order specific performance of personal service contracts, the victims of retaliatory discharge should be entitled to equitable relief in order to protect their statutory and constitutional rights.